Province of
British Columbia

1982

Report on
Interpretation of Wills

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON INTERPRETATION OF WILLS

LRC 58

November 1982

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia.
Report on interpretation of wills.

Bibliography: p.
"LRC 58"
ISBN 0-7718-8345-5

1. Wills — British Columbia. I. Title.

KEB245.A72L37 346.71105'4 C83-092051-X

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To the Honourable Allan Williams, Q.C.,
Attorney General of the Province
of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON INTERPRETATION OF WILLS

In 1978, the Commission added the law of succession to its programme, and since then we have reported on The Making and Revocation of Wills (LRC 52) and Presumptions of Survivorship (LRC 56). A Working Paper has been published on Statutory Succession Rights. In this Report, we examine problems that arise when interpreting the provisions of a will.

Once a will has been admitted to probate, doubts may arise concerning the meaning of words used by the testator. Over several hundred years the law has developed a bewildering array of rules concerning the construction of words used in a will. Many of these rules are both archaic and obscure. Under the current law, courts are sometimes unable to enter into the full inquiry necessary to determine the testator's intention, or upon determining that intention, to give effect to it.

In this Report, we make recommendations which will enable courts more readily to ascertain and give effect to the testator's intentions.

CHAPTER I INTRODUCTION

A. Background to the Project

A project on the law of succession in British Columbia was added to the Commission's programme in 1978. In an earlier Report[1] entitled "The Making and Revocation of Wills" we examined the law governing formalities which must be observed to make a valid will. Some of our recommendations were specifically directed towards ensuring that documents intended by a deceased person to have testamentary effect, and which were free from any suspicion of fraud, forgery or undue influence, would be admitted to probate.

A Court of Probate rules upon the validity of the will.[2] It considers the document or documents submitted for probate and determines whether they represent the true last will and testament of the deceased. If the testator observed the formal requirements of making a will, then a grant of probate will generally issue without a formal court hearing.[3] This is known as proof in common form. If the validity of the will is challenged, then a trial will ensue.[4] This is known as proof in solemn form. A grant of probate signifies that the will of the deceased has been proved in court and is valid, and that the personal representatives of the deceased named in the grant, who, depending on the circumstances, may be called administrators, executors or trustees, are entitled to administer the estate of the deceased.[5]

A number of civil and ecclesiastical courts originally possessed jurisdiction to grant probate of wills.[6] In 1857, an Act of the Imperial Parliament[7] removed probate jurisdiction from "all ecclesiastical, royal peculiar, peculiar, manorial and other courts and persons in England"[8] and vested it exclusively in the newly created Court of Probate.

The distribution and administration of the estate of the deceased is governed by his will and by statute.[9] In many cases the meaning and effect of the will is clear and the personal representative will have no problem ascertaining and carrying out his duties. The debts and liabilities of the estate are paid, the estate is transferred to the beneficiaries named in the will, and the accounts of the personal representative are prepared for the approval of either the beneficiaries of the will or the court. When approval is obtained, administration of the estate is completed.

After probate has been granted, there may be delays in the administration of the estate. A common source of delay is the necessity to determine the meaning and effect of the words used in the will. In British Columbia, the Supreme Court has jurisdiction both to grant probate of a will and to interpret its terms. Notwithstanding that the same court possesses these two jurisdictions, for historical reasons they are exercised in separate proceedings. When ruling upon the validity of a will, the Supreme Court sits as a Court of Probate. When interpreting a will the Supreme Court sits as a Court of Construction. The powers the court may exercise depend upon which jurisdiction it assumes. The Supreme Court of British Columbia may not, when sitting as a Court of Construction, exercise certain powers which it otherwise could as a Court of Probate. The significance of this divided jurisdiction is more fully discussed in Chapter IV.[10]

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[1] Report No. 52, *The Making and Revocation of Wills*.
[2] *See* Feeney, *The Canadian Law of Wills: Probate*, (2nd ed. 1982) chapter 7.
[3] *Ibid.*
[4] Supreme Court Rules (B.C.), Rule 62.
[5] *Supra*, n. 2.
[6] Holdsworth, *A History of English Law*, vol. xv, 203.
[7] 20, 21 Vict. c. 77
[8] *Supra*, n. 6.
[9] *Wills Act*, R.S.B.C. 1979, c. 434, s. 2.
[10] *See infra*, Chapter IV, Rectification.

B. Interpretation of Wills

Although the *Estate Administration Act* provides for the distribution of the estate of a person who dies intestate,[11] many people prefer to make specific provisions for the disposition of their property upon their death. In general, a disposition taking effect on death may be made only by will.[12] Wills may be professionally drafted by lawyers or notaries, but testators often prefer to draw their own wills, either armed with a pre-printed wills form and a layman's guide to filling in the blanks, or unencumbered by any such aids. Both professionally drafted and home-made wills may contain mistakes or ambiguous directions which make it difficult to determine what the testator intended the words in the will to mean.

There are many sources of ambiguity. Draftsmen misunderstand their clients' instructions.[13] Clerical errors occur.[14] Testators, drawing their own wills, fail to appreciate the full significance of the words they have used,[15] inadvertently leave blanks[16] or refer to a beneficiary by the wrong name.[17] Even innocuous descriptions such as "my wife",[18] "my sisters"[19] or "my money"[20] can embroil an estate in protracted litigation to determine what the testator meant, or at least what he must be taken to have meant, by the words he used. For example, in *Re Smith*,[21] a recent Ontario decision, the testatrix bequeathed "all moneys deposited to my credit" in Swiss banks. In addition to money, the banks held silver bullion for the testatrix. The operative concept may have been "money" or it may have been personal property of value "deposited" at those banks. The court held that the ordinary meaning of "money" did not include silver bullion, and the meaning of the word was not altered by the other terms of the will.

Sometimes ambiguity may be attributable to the testator's inability to express himself clearly. An example of this is the will considered in *Re Le Blanc Estate*.[22] The will, written on a single sheet of paper, and in its entirety, read as follows:

> Los Angeles, Cafb, U.S.A.
> 14 June 1953.
>
> Mother in case of quick desesed, my will his forreward to children.
> $6000.00 Olive Braden Six towsend Dollars
> $2500.00 Alice Pigott tow tousand hundres and husdren Dollars
> $2500.00 Felix LeBlanc tow towsend and five husdren Dollars,
> $4000.00 Ernest LeBlanc four Towsend Dollars
> $2000.00
> $1000.00 Desised expenses and taxes
>
> ---
>
> $1800.00—extemartion of properter ellath in towsends Dollars
>
> Mother Mrs. Hosanna LeBlanc

---

[11] *Estate Administration Act*, R.S.B.C. 1979, c. 114.
[12] *Supra*, n. 9.
[13] *E.g.*, *Re Holosko's Will*, (1968) 63 W.W.R. 125 (Alta. S.C.).
[14] *E.g.*, *Re Follett*, [1955] 2 All E.R. 22 (C.A.).
[15] *E.g.*, *MacLean* v. *Henning*, (1903) 33 S.C.R. 305.
[16] *E.g.*, *Re Harris*, [1942] O.W.N. 429 (H.C.).
[17] *E.g.*, *Re Ofner*, [1909] 1 Ch. 60 (C.A.); *Re Smith Estate*, (1953), 9 W.W.R. (N.S.) 173, [1953] 3 D.L.R. 510 (B.C.C.A.).
[18] *Marks* v. *Marks*, (1908) 40 S.C.R. 210.
[19] *Supra*, n. 13.
[20] *See, e.g.*, *Re Smith*, (1981) E.T.R. 87 (Ont. H.C.) *per* Anderson, J.
[21] *Ibid.*
[22] (1955) 16 W.W.R. 389 (Man. Q.B.).

Once the reader is able to grasp the full significance of phrases such as "tow tousand hundres and husdren Dollars" and "extemartion of properter ellath in towsends Dollars," it is apparent that the testatrix, although functionally illiterate, has drawn her will with great care. The beneficiaries are clearly identified. The legacies are described in numerals and in writing. The total worth of the estate is estimated and an allowance is made for debts and liabilities. The court in this case was able to give effect to the intention of the testatrix, despite the many errors contained in her will.

It is well settled that the testator's intention governs the disposition of his estate.[23] The testator's intention is gathered from his will.[24] When the Court of Construction is called upon to interpret a will, it is said:[25]

> . . . the most unbounded indulgence has been shown to the ignorance, unskillfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought from every part of the will, and the whole carefully weighed together . . .

Despite these lofty sentiments, under the current law, courts are sometimes unable to enter into the full inquiry necessary to determine the testator's intention, or upon determining that intention, to give effect to it. Lord Denning, M.R. has remarked:[26]

> I have myself known a judge to say: 'I believe this to be contrary to the true intention of the testator but nevertheless it is the result of the words he has used.'

One need not search very far to find other judges recognizing that their interpretation defeated the testators' intentions.[27]

Courts are inconsistent in the approach they take to interpretation, sometimes preferring to adopt the literal meaning of words, and on other occasions liberally interpreting ambiguously phrased dispositions. A good example of the difficulties which face a Court of Construction when trying to give effect to the testator's intent is to be found in the case of *Sturn* v. *Lettner Estate*.[28] The testator, in a professionally drawn will, bequeathed to the plaintiff a legacy of $10,000 from the anticipated sale of corporate shares. The will further provided that:[29]

> (i) In the event that my Trustee shall sell the shares of capital stock of Pearce Lettner Limited, owned by me, I will and direct that the sum of Ten Thousand Dollars ($10,000.00) shall be paid out of the proceeds of such sale to my friend Pat Sturn, to and for her own use absolutely; the said payment is intended by me to compensate my said friend for the assistance, including monetary assistance, which she rendered to me in the acquisition and development of the business conducted by the said corporation.

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[23] *Singer* v. *Singer*, [1932] S.C.R. 44; *Baker* v. *Baker*, (1858) 6 H.L. Cas. 616, 622, 10 E.R. 1436, 1439; *Hickling* v. *Fair*, [1899] A.C. 15, 27 (H.L.).

[24] *Ibid.*

[25] *Jarman on Wills* (6th ed., 1910) at 453.

[26] *Re Rowland*, [1963] 1 Ch. 1, 9-10 (C.A.).

[27] *See, e.g., Re Walker*, (1925) 56 O.L.R. 517, 27 O.W.N. 425 (O.S.C.-A.D.), ("His intention is plain but it cannot be given effect to," *per* Middleton, J.A.); *Re Burke*, [1960] O.R. 26 20 D.L.R. (2d) 396 (C.A.), *Re White*, [1962] O.R. 590, 33 D.L.R. (2d) 185 (H.C.); *Badger* v. *Streight and Majcunich*, (1961) 29 D.L.R. (2d) 536; *Re Herlichka*, [1969] 1 O.R. 724, 3 D.L.R. (3d) 700 (H.C.); *Harris* v. *Lloyd*, (1823) Turn & R. 310, 37 E.R. 1119, 1120 ("I have not the least doubt that the testator meant illegitimate children, but I am clearly of the opinion that there is not enough upon the face of this will to authorize me to carry that intention into effect," *per* Lord Eldon); *Briscoe* v. *Clark*, 2 Bosanquet and Puller 348, ("I have no doubt that our decision will be contrary to the real intention of the testator," *per* Lord Mansfield); *Re Herwin*, [1953] 1 Ch. 701 (C.A.).

[28] (1980) 98 D.L.R. 700 (S.C.C.).

[29] *Ibid.*, at 701.

The trustee sold the assets of the company instead of its shares, and both at trial[30] and upon appeal[31] it was held that the plaintiff was not entitled to the legacy because the stipulated event did not occur. Upon appeal to the Supreme Court of Canada it was held that the plaintiff was entitled to the legacy. It was said:[32]

> I am of the opinion that there is no need here to consider whether a demonstrative legacy was provided in cl. 4(i), although in the view of counsel for the executor and trustee that could be a basis for finding in favour of the appellant. He put the matter in the following way: if cl. 4(i) referred to the time of payment of the legacy, that being upon disposition of the business, resort could be had to the general assets of the residue in the absence of any fund from the sale of shares. As I have said, it is unnecessary to consider this route. A fair reading of cl. 4(i) persuades me that the testator clearly had in mind paying the appellant the specified legacy out of the sale of the business which she had helped him to acquire and develop, however that disposition was made. He wished Jeffery Wyatt to continue to manage the business pending the sale of its assets as provided for in cl. 5(c). However, and here again I agree with Dubin, J.A., the provision for sale of assets in cl. 5(c) did not so gloss the terms of cl. 4(i) as to make the legacy payable only on a sale of the shares. The overriding intention of the testator, expressed in cl. 4(i), is against so narrow a construction.

The *Lettner Estate* case indicates the difficulties the courts have in giving effect to the discoverable intent of the testator. Even when the intent is clear upon the face of the will, the court may not be able to give effect to it.

In *Re Allan*,[33] a Prince Edward Island decision in which the problems of interpretation involved were similar to those raised in *Re Lettner*, the court had no problem coming to a common-sense interpretation. There the testatrix made a gift to her four children in trust until they reached the age of 28. If any child died before receiving his or her share, the gift was to be divided among the survivors. All of the children reached the age of 28, but they agreed that the property should not be sold. One child died at the age of 33. The court was asked whether that child's estate was entitled to a share of the gift.

That child had not "received" her share before her death, in a literal sense. However, the court held that the gift vested when she became 28. It was insignificant, therefore, whether she actually received it.

A comparison of the *Lettner Estate* case with *Re Allan* indicates that even though the courts appear to be using the same approach to interpreting wills, the results that ensue may be inconsistent. Over the centuries, rules have been developed to guide the courts when interpreting wills and to limit the issues and the scope of the inquiry before the courts. Some of these rules determine when the courts may hear evidence and what kinds of evidence it may hear. Other rules, known as the rules of construction, provide that certain words or phrases bear *prima facie* meanings. These rules are not always straightforward or consistent, and may, unless applied with caution, impede the court's efforts to give effect to the discoverable intent of the testator.

Our present *Wills Act* is based upon the English *Wills Act, 1837*,[34] which was enacted as reform legislation designed to limit litigation arising with respect to real property and the "doubts and difficulties which arise upon Titles"[35] passing under wills. This legislation was based upon the Fourth

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[30] (1977) 80 D.L.R. (3d) 287, 17 O.R. (2d) 201 (Ont. H.C.).
[31] (1978) 87 D.L.R. (3d) 1, 20 O.R. (2d) 177, 2 E.T.R. 155 (Ont. C.A.).
[32] *Supra*, n. 28 at 703.
[33] (1981) 31 Nfld. & P.E.I.R. 510, 87 A.P.R. 510 (P.E.I.S.C.).
[34] 1 Vict., c. 26.
[35] *Fourth Report of the Real Property Commissioners*, 1833, at 3.

Report of the Real Property Commissioners, published in 1833. The Commissioners recognized that uncertainties respecting title:[36]

> . . . must be attributed, in a great degree, to the informal manner in which Wills are frequently expressed, the Law not requiring them to be framed in the technical forms which are essential to limitations in Deeds.

The Commissioners declined to consider the problem of construction of wills, believing it to be more properly the subject of a study concerning the construction of legal instruments generally. In our opinion, for reasons canvassed in the next chapter, the problems encountered in the construction and interpretation of wills require separate consideration. In the balance of this Report we will consider the powers of the court to discover and to give effect to the testator's intent.

C. The Working Paper

The Commission circulated a Working Paper on Interpretation of Wills in November 1981. That Working Paper generated a great deal of useful comment, which has received the serious consideration of the Commission in the preparation of this Report. Comment on particular aspects of the tentative proposals made in the Working Paper will be discussed in the following chapters of this Report.

In addition to written comments, many people interested or expert in aspects of the law under study, voluntarily gave of their time to discuss the proposals made in the Working Paper. Meetings were held in Victoria and Vancouver, at which far-ranging discussions and debate took place.

Law reform is a laborious and time-consuming undertaking. The Commission is very grateful to those people who devoted their time and talents to consider our work.It is only through that process that effective and practical law reform can be promoted, particularly when an area of the law under examination, such as interpretation of wills, is highly technical and, in many respects, obscure.

In the Working Paper we also discussed problems posed by class gifts and the class closing rules.[37] Our correspondents were divided on whether it was desirable to amend those rules, although there was marked agreement that expanded trustee powers, to make payments from trust monies to beneficiaries for their maintenance, advancement or otherwise for their benefit, were desirable. The Commission is considering whether a project on trustee powers of advancement should be undertaken. In any event, the class closing rules are not directly linked to problems that arise with respect to interpreting and rectifying wills, and for these reasons, we have not included that discussion in this Report.

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[36] *Ibid.*

[37] The proposals we made in Working Paper No. 32, Interpretation of Wills, respecting the class closing rules and trustee powers of advancement, are to be found in Appendix B to this Report.

CHAPTER II INTERPRETATION: THE OBJECTIVE MEANING VERSUS THE MEANING THE TESTATOR ASCRIBED TO THE WORDS USED IN HIS WILL

A. Introduction

Courts have formulated principles of interpretation which apply with equal force to the construction of all legal instruments, whether the document being considered is a will, contract, deed or statute. If there is one principle that may be considered fundamental, it is that the court is to determine the meaning of a legal instrument from the language used by its makers, without regard to what they intended the language to mean.[1]

That principle can be applied in one of two ways. Those courts which prefer the literal meaning of words used over the meaning the testator intended them to bear seek an objective interpretation of the will. Courts that interpret subjectively attempt to discover the meaning the testator ascribed to the words he used. For the most part, courts tend to interpret legal instruments objectively, although in recent years a number of cases suggest that a more liberal approach to the interpretation of legal instruments may be emerging.

When interpreting a will, the court attempts to discover the "ordinary meaning" of the words used. A word may have many meanings. Its primary or dictionary meaning may mean one thing, secondary meanings quite another. The meaning of a word may be shaded or varied depending on its context, both in terms of the immediate sentence it appears in and in terms of the whole of the will. Since the use of language is an art, and many testators are incapable of using language with precision, none of these meanings may correspond to the meaning the testator intended his words to have.

B. Attitude of the Courts

1. Generally

Whether the courts are to interpret wills literally, or to discover what meaning the testator ascribed to the words used in his will, is a question on which judges now differ. In older decisions, judges were firm in giving effect to an objective interpretation of the words used. The general rule was one of strict construction. It has been said:[2]

> Many Courts of construction . . . [say] that their duty is not to ascertain the testator's actual mental intentions; that they are only concerned with the meaning of the words used in a will; that the expressed intention is to be considered the testator's actual intention. Unfortunately, the approach that has found favour with most Canadian Courts of construction appears to be the one expressed by Baron Rolfe, namely, that the function of a Court of construction is merely to ascertain "*quod voluit* by interpreting *quod dixit*." It is submitted that such a literal approach to the construction of wills is seldom compatible with justice, and indeed, has been the cause of many mistakes in construction that have resulted in the commission of injustice.

Nevertheless, courts are sensitive to the fact that strict construction will often defeat the testator's intention. In more recent cases some courts have preferred a more liberal approach to interpreting wills. British Columbia courts, in particular, have tended to depart from objective interpretation. In several

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[1] *Odgers' Construction of Deeds and Statutes* (5th ed.), at 27.

[2] Feeney, *The Canadian Law of Wills: Construction* (2nd ed., 1982), at 2.

recent cases the courts have interpreted wills in order to discover what the testator intended the language he used to mean.[3]

2. Strict Construction

Theobald on Wills sets out the procedure which the courts are to follow when interpreting a will:[4]

> The procedure is not—first ascertain the surrounding circumstances and with that knowledge approach the construction of the will, but first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give the will a different meaning.

This procedure promotes strict construction and has been cited with approval by the Supreme Court of Canada in *Tottrup* v. *Patterson*.[5]

The case most often cited in support of this procedure is the decision of the House of Lords in *Higgins* v. *Dawson*.[6] The only significant assets possessed by the testator when he executed his will consisted of mortgages securing loans he had made. The testator directed the payment of a number of legacies, and gave the "residue" of the mortgages, after the payment of his debts and funeral and testamentary expenses, to charity. The court was called upon to discover the meaning of "residue," and to determine whether the mortgages were charged with payment of both the testator's debts and the legacies, or of the testator's debts alone. Strictly construed, only the testator's debts were to be deducted from the mortgages. On a subjective reading, taking into account that the testator had no other assets to satisfy the legacies when he made his will, it was likely his intention that the legacies were also to be paid out of the mortgages. Nevertheless it was held that, on a strict construction, the mortgages were to be paid to the charity after deduction of the debts of the estate only and that the legacies must abate.

Re Hodgson[7] is another example of strict construction. The testatrix bequeathed her "money" to two named persons. She made no gift of the residue of her estate. "Money" was given its primary meaning and it was held that the will did not effectively dispose of other assets of the testatrix, which consisted of National Savings Certificates and War Stock.

3. The Meaning the Testator Ascribed to the Words Used in his Will

The cases which may be cited against an objective approach to interpretation are of compelling authority. The House of Lords, in *Perrin* v. *Morgan*,[8] was called upon to interpret another disposition of "money" and was able to read it in a sense wider than its primary meaning in order to give effect to the actual intent of the testatrix. The Supreme Court of Canada, in *Marks* v. *Marks*,[9] made a searching inquiry into extrinsic circumstances to determine whom was meant by the testator's reference to "my wife." It was alleged that the testator had been married twice. The woman who claimed to

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[3] *See, e.g., Re Flinton; Canada Trust Co.* v. *Banks*, (1982) 10 E.T.R. 236 (B.C.S.C.); *Re Hansen*, (Unreported B.C.S.C. decision), [1982] B.C.D. Civ. 4209-04, *per* McMorran, L.J.S.C., *Thorson* v. *Christie*, (Unreported B.C.S.C. decision), [1980] B.C.D. Civ. 4209-01, *per* Tyrwhitt-Drake, L.J.S.C. Interpretation is to "elucidate the true intentions of testators unfettered by artificial and frustrating rules of construction": *Seppala* v. *McIver*, (Unreported B.C.S.C. decision), [1981] B.C.D. Civ. 4209-04, *per* McLachlin, L.J.S.C.; *Towers* v. *Canada Permanent Trust Company*, (Unreported B.C.S.C. decision), [1982] B.C.D. Civ. 4209-03, *per* Cowan, L.J.S.C.

[4] (13th Ed., 1971), at para. 427.

[5] [1970] S.C.R. 318, 322; *see also Re Ottewell*, (1969) 9 D.L.R. (3d) 314, 316.

[6] [1902] A.C. 1, (H.L.).

[7] [1936] Ch. 203.

[8] [1943] A.C. 399 (H.L.).

[9] (1908) 40 S.C.R. 210.

be his first and actual wife, however, was unable to prove the marriage. The property went to the testator's "second" wife, the woman with whom he was living at the time of his death. The subjective approach to interpretation has also been confirmed in *Re Burke*,[10] *Re Harmer*[11] and Haidl v. Sacher.[12] Professor Feeney, after reviewing Canadian authorities concluded:[13]

> . . . if Canadian law has not yet fully adopted the subjective approach to construction, it at least favours such an approach. Under the subjective approach the ordinary meaning of words is not to be regarded as the objective or dictionary meaning; it is to be regarded as the meaning the words had for the testator. In the first instance, a Canadian Court is thus at least allowed, if not duty bound, to interpret a word or words in the light of all the facts and circumstances of the case, so as to select from among two or more meanings in ordinary use the meaning that makes the most common sense of the testator's will.

We agree with Professor Feeney. Nevertheless it must be recognized that there remains substantial uncertainty in the law concerning which approach should be adopted. In *Re Welsh*,[14] a recent decision, Holland J. preferred subjective interpretation, but felt it necessary to cite long passages from *Marks* v. *Marks*,[15] *Perrin* v. *Morgan*[16] and *Re Burke*[17] in order to justify his decision.

In *Re Klein*,[18] a recent decision of the British Columbia Court of Appeal, the objective approach toward interpretation seems to have been approved. The testator, by will, gave all of his estate to his wife "to hold unto her, her heirs, executors, and administrators, absolutely and forever." There were no children of the marriage. The wife had a son from a previous marriage, whom the testator treated as a member of his family. The testator's wife predeceased him.

The trial judge interpreted the will as providing for the testator's estate to devolve upon his wife if she survived him, and if not, then upon her heirs (the wife's son).[19] The trial judge came to this conclusion after considering the surrounding circumstances which existed when the will was made, including primarily the close relationship between the testator and his wife's son. The words the testator used were ambiguous, and the trial judge's interpretation would appear sensible in the circumstances of the case.

The Court of Appeal rejected that construction. It held that the words were clear and susceptible to only one meaning, which was that the gift to the wife was an absolute gift (i.e., that the words were words of limitation). In the course of the court's judgment, *per* Taggart J.A., a long passage from *Tottrup* v. *Patterson*[20] was cited, and in particular, that portion of the judgment which dictated that interpretation of wills must be objective. If the meaning of the words is clear, then the courts may not refer to surrounding circumstances to throw doubt upon that meaning. Evidence of surrounding circumstances is only admissible where the meaning of the words used in the will is in doubt. In the result, the court held that the deceased died intestate. No next-of-kin of the deceased were known. It was likely the estate would escheat to the Crown.

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[10] [1960] O.R. 26, 20 D.L.R. (2d) 396 (C.A.).

[11] [1963] 2 O.R. 690, 40 D.L.R. (2d) 825 (H.C.); [1964] 1 O.R. 367, 42 D.L.R. (2d) 321 (C.A.); 46 D.L.R. (2d) 521 (S.C.C.).

[12] (1980) 106 D.L.R. (3d) 360 (Sask. C.A.).

[13] *Supra*, n. 2 at 55.

[14] (1980) 28 O.R. (2d) 403 (Ont. H.C.).

[15] *Supra*, n. 9.

[16] *Supra*, n. 8.

[17] *Supra*, n. 10.

[18] (1981) 7 E.T.R. 176 (B.C.C.A.).

[19] The trial judge interpreted the language as words of purchase or substitution and not as words of limitation.

[20] *Supra*, n. 5.

C. Admissibility of Evidence

The general rule with respect to admissibility is that evidence relevant to the issues in dispute is admissible unless barred by some exclusionary rule. Exclusionary rules have been developed which restrict the evidence a court may consider when interpreting a will. Enquiry into extrinsic evidence is ordinarily curtailed because the will itself represents the testator's intention.

At one time it was thought that generally the meaning of documents affecting legal rights should be gathered from the words used in them and not collected from extrinsic circumstances. Thayer, in 1898, commenting on an early decision which favoured objective interpretation, makes the following observations:[21]

> The Chief Justice here retires into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes. Men have dreamed of attaining for their solemn muniments of title such an absolute security; and some degree of security they have compassed by giving strict definitions and technical meanings to words and phrases, and by rigid rules of construction. But the fatal necessity of looking outside the text in order to identify persons and things, tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether spoken or written.

In fact, no legal document can be interpreted without some reference to extrinsic circumstances. In the interpretation of a will, as with other legal documents, if evidence of extrinsic circumstances is admissible, it may only be used to explain what the testator has written,[22] not what he intended to write.[23] The court cannot give effect to any intention which is neither express nor implied by the words of the will.[24]

These are sensible restrictions on the use of evidence, since the only accurate record of the testator's intentions is his will. It does not follow, however, that the evidence which may be considered to determine the meaning of a will, must be limited so as to require strict, objective or literal interpretation. In many cases the courts will hear evidence of the surrounding circumstances known to the testator when he made his will. This is known as the "armchair rule." Notionally, the court attempts to place itself in the testator's "armchair" when he was making his will, in order to determine what ambiguous directions may mean. There is some doubt, however, concerning when the court may hear evidence, the kinds of evidence it may hear, and for what purposes. In general, the nature of the uncertainty or ambiguity contained in the will determines when the court may hear evidence, and what evidence is admissible.

There are two general categories of ambiguity. A patent ambiguity is one that is apparent on the face of the will. For example, two inconsistent provisions regarding the same gift would create a patent ambiguity. A latent ambiguity, or equivocation, is one that does not appear upon the face of the will but emerges upon reference to extrinsic circumstances. Words used to describe a gift which apply indifferently to two or more or no possible assets or donees may constitute a latent ambiguity.[25]

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[21] *Evidence*, (1898) at 428-9.

[22] *Halsbury's Laws of England*, (3d) vol. 39, "Wills," para. 1445.

[23] *Ibid.*; *Re Mayo*, [1901] 1 Ch. 404; *Re Glassington*, [1906] 2 Ch. 305.

[24] *Simpson* v. *Foxon*, [1907] P. 54; *Scale* v. *Rawlins*, [1892] A.C. 342 (H.L.).

[25] *Re Walker*, (1923) 53 O.L.R. 480, [1924] 1 D.L.R. 719 (H.C.); *Re McMillan*, [1925] 3 W.W.R. 584 (Sask. Surr. Ct.).

These two general categories are neither all-encompassing nor capable of exact definition. For example, a blank left in a will creates an ambiguity discoverable on the face of the will, but in some cases courts have been prepared to find that it constitutes a latent ambiguity.[26] In some cases the words used are so uncertain that no evidence may be admitted to clarify the gift or its donee,[27] or so apparently certain that no evidence may be led to contradict them.[28]

If evidence is inadmissible, ambiguous provisions may be interpreted by resort to the rules of construction. The rules of construction are often obscure and complex. In many cases they assign an arbitrary meaning to the testator's words. The rules of construction are more fully discussed in Chapter III.

1. Patent Ambiguity

Only evidence of extrinsic circumstances, and not of the testator's dispositive intent, is admissible to resolve a patent ambiguity.[29] The line between evidence of extrinsic circumstances and direct evidence of dispositive intent is very fine and sometimes difficult to draw.

The distinction depends upon the purpose for which the evidence is adduced. Thus, in some cases, evidence which appears to go toward dispositive intent will be admissible for the limited purpose of showing surrounding circumstances. In the case of *Re Ofner*,[30] the testator made a gift to "my grandnephew Robert Ofner." The testator's grandnephew was named Richard. A memorandum prepared by the testator to instruct his solicitors contained the same mistake but otherwise accurately described Richard. The memorandum was held to be admissible, not as evidence of the testator's dispositive intent, but rather to identify the grandnephew who was inaccurately described. It was said:[31]

> It might very well be, and I think probably would be, that if evidence had been given in contradiction shewing that the testator had been in the habit of writing to Richard as Richard, we should not have been able to allow this to countervail it, and that, perhaps, is a way of pointing the difference between using this document as a mere document and using it as instructions . . . It could not be used as evidence in contradiction of a proved habit of calling Richard Richard in letters and so on . . . for that would be to put it forward as evidence of intention as distinct from evidence of the meaning of the name.

Essentially the distinction is between evidence which goes to the meaning of a word, which is admissible, and that which goes to the testator's intention, which is not. As in the *Re Ofner* case, sometimes the distinction is highly artificial.

Quite apart from the difficulty of characterizing the nature of the ambiguity and the purpose for which extrinsic evidence may be led, there is a conflict of authority on how far evidence of extrinsic circumstances is admissible to guide the court of construction. Some judges hold that extrinsic evidence is admissible only if the will is patently ambiguous[32] and then only to the point

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[26] *E.g., Re Hubbuck Estate*, [1905] P. 129.

[27] *Peck* v. *Halsey*, (1726) 2 P.Wms. 387, 24 E.R. 780; *Jubber* v. *Jubber*, (1839) 9 Sim. 503, 59 E.R. 452; *see also Jarman on Wills* (6th ed.) at 455.

[28] *Supra*, n. 6.

[29] *Re Lucey Estate*, [1950] 2 W.W.R. 1167 (Sask. C.A.); *Colpoys* v. *Colpoys*, (1822) Jac. 451, 37 E.R. 921; *Re Warren*, (1922) 52 O.L.R. 127; *Re Dixon*, [1935] 3 W.W.R. 118 (B.C.S.C.); *Re Swanson*, [1941] 1 W.W.R. 641 (Alta. S.C.); *Perrin* v. *Morgan*, *supra*, n. 8; *Re Diver Estate*, (1962) 39 W.W.R. 612, 34 D.L.R. (2d) 667 (Alta. S.C. App. Div.); *Marks* v. *Marks*, *supra*, n. 9; *Re Shapiro*, (1980) 27 O.R. (2d) 517 (Ont. H.C.).

[30] [1909] 1 Ch. 60 (C.A.).

[31] *Ibid.* at 68.

[32] *Higgins* v. *Dawson*, *supra*, n. 6; *Tottrup* v. *Patterson*, *supra*, n. 5; *Re Klein*, *supra*, n. 18.

of identifying *prima facie* the subject matter or donee of the gift.[33] Courts that adopt this position favour literal or objective interpretation.

In *Re McMahon*,[34] a recent British Columbia Supreme Court decision, the court distinguished between when extrinsic evidence was admissible by reference to the kind of patent ambiguity involved. It was held that the word "wife" permitted the introduction of extrinsic evidence to discover what meaning the testator attached to that word. The phrase "one-half of the capital", it was held, fell within a different category, to which extrinsic evidence was not admissible. The meaning of that phrase must be its ordinary and general meaning. That approach does not appear to be helpful. By "capital," for example, the testator may have meant a particular fund, or he may have meant the entire estate. If there is an ambiguity in interpretation, extrinsic evidence should be admissible to resolve it.

Other courts hold that extrinsic circumstances may be referred to in every case in order to determine the "ordinary meaning" of the words used even if the will is not patently ambiguous[35] and beyond the point of identifying *prima facie* the subject matter or donee of the gift.[36] In this way courts are more likely to discover the testator's true intent. By "true intent" we do not mean some intention the testator may have had but chose not to record in his will. The testator's "true intent" refers to the meaning he intended the words in his will to convey.

An example of the distinction between these two approaches is to be found in the English case of *Perrin* v. *Morgan*.[37] The testatrix had directed in her will that "all moneys of which I die possessed . . . shall be shared by my nephews and nieces now living." The testatrix had very little actual "money" but did possess other substantial personal estate. The primary meaning of "money" is very narrow and, reluctantly, the Court of Appeal held that the gift was not ambiguous. No evidence was admissible to contradict the primary meaning of money.[38] The balance of the personal estate of the testatrix passed on an intestacy. On appeal,[39] the House of Lords held that the strict meaning of "money" was rebutted by the context of the word in the will. What the House of Lords meant by "context" is not entirely clear from the report. They may have meant that grammatically the word must be interpreted in the context of the entire will, but not beyond its "four corners," or they may have meant that the context of circumstances surrounding the making of the will required that the word be read more generously. Lord Atkin clearly favoured the latter view, and said:[40]

> . . . the construing court has to ascertain what was meant, being guided by the other provisions of the will and the other relevant circumstances, including the age and education of the testator, his relations to the beneficiary chosen, whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these, the court must adopt what appears the most probable meaning. To decide on proven probabilities is not to guess but to adjudicate. If this is to decide according to the "context," I am content, but I cannot agree that the court is precluded from looking outside the terms of the will. No will can be analysed *in vacuo*.

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[33] *Re Hodgson*, *supra*, n. 7.

[34] (Unreported B.C.S.C. decision) [1981] B.C.D. Civ. 4209-05, *per* Mackinnon, J.

[35] *Perrin* v. *Morgan*, *supra*, n. 8; *Marks* v. *Marks*, *supra*, n. 9; *Re Harmer*, *supra*, n. 11 (H.C.); *Haidl* v. *Sacher*, *supra*, n. 12.

[36] *Re Burke*, *supra*, n. 10; *Re Smith*, (1953) 9 W.W.R. 173, [1953] 3 D.L.R. 510 (B.C.C.A.); *Re Fairfoull*, (no. 2), (1974) 44 D.L.R. (3d) 765 (B.C.S.C.); *Re Dickson*, [1965] 1 O.R. 661, 49 D.L.R. (2d) 289 (H.C.).

[37] *Supra*, n. 8.

[38] [1942] Ch. 345 (C.A.).

[39] *Supra*, n. 8.

[40] *Ibid.*, at 414.

By considering extrinsic evidence, even though it is difficult to characterize a disposition of money as patently ambiguous, the House of Lords was able to discover the meaning of, and give effect to, a disposition as the testatrix most likely intended they should. The Court of Appeal, applying rules of strict construction, felt compelled to come to an arbitrary interpretation, well aware it was probably defeating the intent of the testatrix.

The recent decision of the British Columbia Court of Appeal in *Re Klein*, mentioned earlier, would appear to reflect the law as it was before *Re Perrin*. There is a need to clarify when the courts may consider extrinsic evidence and for what purposes.

2. Latent Ambiguity

When a gift is latently ambiguous evidence of the testator's dispositive intent may be admissible to resolve the ambiguity.[41] Commenting on the distinction between the kinds of evidence admissible to resolve patent and latent ambiguities, *Jarman* observes:[42]

> It is true, as Lord Selbourne remarked . . . that the principle does not rest on a rational foundation, but it is clearly established.

Professor Warren makes the following observations respecting the distinction between latent and patent ambiguities:[43]

> Direct statements of the testator's meaning are not admissible in aid of construction, except in cases of equivocation [latent ambiguity]. Bacon's *Maxims* must be referred to. These date from at least as early as 1596-97.
>
> > "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.
> >
> > *Ambiguitas patens* is never holpen by averment . . ."
>
> It has been pointed out that these rules had nothing to do with any particular kind of admissible evidence; but, indeed, they had to do with pleading. According to the manner of the time, a doubt which arises upon the writing alone must be solved solely from the writing; but a doubt which first arises from the application of the writing to the facts may be resolved from the facts. Later, when the admissibility of external evidence in aid of construction became frequent, the maxims were used sometimes as a test for the production of any evidence whatever, and sometimes in aid of the admissibility of the testator's direct statements of his meaning [in the case of equivocation. The history of this has been outlined by Professor James Bradley Thayer. In the early part of the 1700's direct statements by the testator were used much more widely than at present. The rule was hardening, however, in the latter part of that century, and in the 1800's had assumed its modern form as an exception to the general principle of admissibility, and an exception (in cases of equivocation) to the exception.

Thayer states that:[44]

> Bacon's maxim was an unprofitable subtlety. In truth, the only patent ambiguity that was not open to explanation by extrinsic matter was one that, in the nature of things, was not capable of explanation.

Bacon's maxim related to pleading, not evidence. It has been suggested that Bacon invented the distinction between patent and latent ambiguities and that it was intended to clarify a very minor aspect of interpretation.[45] It did not

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[41] *R.* v. *Walker*, *supra*, n. 25; *N.S.P.C.C.* v. *S.N.S.P.C.C.*, [1915] A.C. 207 (H.L.); *Re Kappele*, [1954] O.R. 456 (H.C.), [1955] 1 D.L.R. 29 (Ont. C.A.); *Re Mallaus*, (1947) 21 M.P.R. 385 (N.B.); *Re Smith*, *supra*, n. 36.

[42] *Jarman on Wills* (6th ed., 1910), Chapter XV, at 518.

[43] (1936) Harv. L.R. 689.

[44] *Supra*, n. 21, at 424-426.

[45] *Ibid.*

receive the general notice of the profession until about 150 years later when it was published as a convenient means of dealing with the whole issue of interpretation. Nevertheless, it was originally created as a means of determining upon what issues evidence would be received, not as a means of determining "the nature of the evidence admissible on each issue."[46]

One example should serve to demonstrate the arbitrary nature of the distinction made between latent and patent ambiguities. A gift "to John's son," John having more than one son, creates a latent ambiguity,[47] and evidence of the testator's dispositive intent would be admissible to determine which son the testator intended to benefit. A gift "to one of the sons of John" or "to _____ , John's son," however, may constitute only a patent ambiguity.[48] If any evidence is admissible, which is arguable, it would be restricted to extrinsic circumstances surrounding the making of the will. The court would not be permitted to refer to evidence of the testator's dispositive intent. The differences in wording do not appear to be so fundamental as to justify the use of substantially different rules of evidence in order to interpret the testator's will. As has been observed elsewhere:[49]

> . . . although the legal rules governing the interpretation of wills are entirely rational, intelligible and well settled, the hands of the Judges in applying them to individual cases are either fettered or free, according to the caprice of the testator in wording his will.

D. Is an Objective Approach Appropriate for the Interpretation of Wills?

The conditions under which wills are made are often conducive to error and ambiguity. A will may be prepared in haste under distracting circumstances. As the Real Property Commissioners observed in 1833:[50]

> Cases must frequently occur in which it is desirable that Wills should be made, when there is not time to procure any professional assistance, as on a death-bed, in the event of accident or sudden illness; and there is a disposition in many persons both to delay until the latest moment the making of a Will, and to do it in secrecy, to which the Law must, we think, have regard.

Even when the testator prepares a will in health and at leisure, error and ambiguity may result. When deciding upon the distribution of his estate, a testator is contemplating his own death. His attention may be more fixed upon worrying whether he can adequately provide for dependants than upon expressing himself clearly. He may not realize that he has made provisions which are confusing, or he may be unable to express himself accurately, like the testatrix in the *Re Le Blanc* case, mentioned in Chapter I. The descriptions he uses may tend to be personal, idiosyncratic or eccentric.[51]

If an objective interpretation of a legal instrument other than a will operates harshly, in many cases these results can be alleviated. A statute which has been interpreted contrary to the meaning it was intended to have can be amended. If the provisions of a deed are uncertain or void, another deed can be made, this time accurately recording the maker's intention. If an error has

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[46] *Ibid.* at 425.

[47] *Lord Cheyney's Case*, 5 Co. Rep. 68b., 77 E.R. 158; *Jones* v. *Newman*, Black W. 60, 96 E.R. 32 cited by Jarman, (6th ed.) at 518.

[48] *Price* v. *Page* (1799) 4 Ves. Jun 679, 31 E.R. 351; *Sir Litton Strode* v. *Lady Russel*, (1707) 2 Vern. 621, 23 E.R. 1008; *see also Theobald on Wills*, (13th ed., 1971) 165.

[49] F. P. Betts, "Misdescriptions in Wills," (1929) 7 Can. B.R. 579.

[50] *Fourth Report of the Real Property Commissioners*, 1833, at 3.

[51] *E.g. Re Fish*, [1894] 2 Ch. 83 (C.A.); *Re Ofner*, *supra*, n. 30; *Doe d. Chichester* v. *Oxenden*, (1816) 3 Taunt. 147, 128 E.R. 58.

been made in a contract or deed, it may be rectified.[52] But if a will contains an error, or is objectively interpreted to have a meaning other than that which the testator intended it should have, there is no recourse. In our opinion, these factors indicate that objective interpretation is not always appropriate for wills.

It is sometimes argued that the *Wills Variation Act*[53] (formerly known as the *Testator's Family Maintenance Act*) offers a satisfactory means of protecting against errors in interpretation. Under the *Wills Variation Act*, a testator's spouse or child may apply for a greater share of the estate if inadequately provided for in the will. There are two reasons why this is not a satisfactory means of protecting against errors in interpretation. First, beneficiaries prejudiced by a strict construction, other than spouses or children, may not apply. Second, the powers granted to the court under the *Wills Variation Act* are discretionary. These powers do not assist the court in giving effect to the testator's intent. Indeed, they are often used to defeat the testator's intent.

E. The Arguments in Favour of Objective Interpretation

The arguments in favour of objective interpretation and against the general admissibility of extrinsic evidence may be described under the following headings:

1. The Formalities of Execution

   The law stipulates that a valid will must be made observing certain formalities to ensure that the true last wishes of the testator are contained in his will. To depart from a literal reading of the will would make the formalities meaningless or of little effect;

2. Reliable Guides to Intention

   There may be no other reliable guide to the testator's intent;

3. Consistency of Interpretation

   One will, whenever considered, should be consistently interpreted; and

4. Certainty

   The reader of a will, and its maker, can be assured that the will means what it says if it is clear on its face.

We will consider each of these arguments.

1. The Formalities of Execution

The Wills Act requires that a will to be valid must be in writing and signed at its end by the testator in the presence of two attesting witnesses.[54] The requirement of two witnesses to the testator's signature is intended to make it more difficult to forge the testator's signature to a fraudulent will. The testator's signature at the end of the will signifies his approval of all that precedes it. Any writing following the signature is disregarded, again in order to limit the opportunity for someone other than the testator to alter his will. Other provisions of the *Wills Act* deal with alteration and revocation of wills,[55]

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[52] *See infra*, Chapter IV, *Rectification*.
[53] R.S.B.C. 1979, c. 435.
[54] *Wills Act*, R.S.B.C. 1979, c. 434, s.s. 3, 4, 6.
[55] *Ibid.* s.s. 15, 16, 17.

and in each case these provisions are designed to ensure that the will in its final form truly represents the wishes of the testator.

In our Report on *The Making and Revocation of Wills*, we examined these formalities and concluded that as safeguards against fraud, forgery or undue influence, they are not truly effective. As well, many wills which are free of any suspicion of tampering by another, have been found to be invalid because of technical defects. We recommended the adoption of a dispensing power to save imperfectly executed documents intended by the deceased to have testamentary effect. It was our view that, on balance, fulfilling the testator's intent was worth the minimal risk of fraud and other dangers which such a provision entails.

Although the formalities of execution required by the *Wills Act* may serve other worthwhile purposes, they should not prevent the courts from discovering the meaning the testator ascribed to the words in his will. As one commentator has said:[56]

> . . . the testator's intentions, where they can reasonably be deduced from evidence available, should be paramount [to the formal requirements]; otherwise, the spirit of the *Wills Act* is itself subordinated to the formal requirements designed to put that purpose into effect.

If the formalities of execution restrict enquiry into what the testator intended his will to mean, they defeat their primary function. Rules designed to ensure that the testator's will represents his testamentary intentions untampered with by others, should not be used to prevent the courts from discovering what those testamentary intentions are.

2. Reliable Guides to Intention

In addition to the fear that departing from the literal meaning of a will would jeopardize the protections offered by the formalities of execution, the courts were of the view that only the testator's will could be a reliable guide to his intention. When the will takes effect the testator is dead and only he could have clarified what he intended his will to mean. In 1919, Lord Buckminster observed:[57]

> . . . whatever wavering from the strict rule of construction may have taken in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

That position would appear to underlie the recent decision of the British Columbia Court of Appeal in *Re Klein*, referred to earlier. When the meaning and effect of a will is clear, there can be no objection to literal interpretation. But when a disposition in a will is unclear or ambiguous, then because generally the courts cannot look further than the words of the will to discover what they mean, often the courts must rely upon the rules of construction to find an arbitrarily chosen meaning. When the will is ambiguous, it is clearly inappropriate to characterize it as a "reliable" guide.

There are many cases, however, where evidence of the testator's intention does not perish with him. The decisions of the lower courts in *Sturn* v. *Lettner*, discussed previously, provide examples of the unreasonable results which may be obtained from a literal reading. If there is evidence of the testator's intention which will assist the courts when interpreting his will, the only

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[56] G.M. Bates, "Another Case for Intention," (1976) 126 New L.J. 1083, 1085.

[57] *Per* Lord Buckmaster, *Auger* v. *Beaudry*, [1919] 3 W.W.R. 559, 562, [1920] A.C. 1010, 1014, 48 D.L.R. 356, 359 (P.C.).

justification for disregarding it is the expense of determining its reliability. In many cases, extrinsic evidence may be a reliable guide to the testator's actual intention. It is wrong to reject evidence of intention merely because such evidence can be unreliable or fabricated. Unreliability goes to the weight to be given to such evidence, not to its admissibility. In any event, evidence which is shown to be unreliable will be disregarded.

3. Consistency of Interpretation

The law strives for consistency because justice requires similar decisions upon similar facts. The attempt to ensure consistency in expression and result from will to will is not only of little value, however, it is futile. Professor Feeney has observed:[58]

> . . . an attempt to construe clauses and phrases of a will in accordance with precedent is apt to lead to a total disregard of the testator's intention. Unlike deeds and similar documents, there is no single form of will or will precedent. Because of the variations from will to will, it would be an unlikely coincidence that two wills would express, on the whole, precisely the same intention.

The need for consistently interpreting expressions used in wills arose at a time when English law permitted one will to be contested in a number of actions and suits. Prior to 1837, equitable, ecclesiastical or common law courts took jurisdiction over wills depending upon the kind of property involved or the nature of the dispute.[59] In some cases the intervention of a court was not required. Wills devising estates in fee simple did not need to be proved unless title was contested.[60] A contemporary discussion described the position as follows:[61]

> A final decision respecting the validity of a will cannot be obtained at Law except in a few rare cases. When the Will has been proved in an Action or Suit, it may often be disputed again in another Action or Suit by the same or different parties; and when the persons claiming adversely to the Will do not think proper to bring forward their claims, there are frequently no means of preventing them from disputing the validity of the Will at a future time.

Consistent interpretation in this context means not so much that like wills should be construed alike, but that one will, in however many actions it might be considered, should be construed identically. Reform legislation reduced litigation by referring all questions of interpretation to the Courts of Equity. These courts were given jurisdiction to make a final determination of the meaning of a will, subject only to the usual appeal process.[62]

Additionally, it should be remembered, many matters of interpretation came before common law courts and were heard by juries. Many exclusionary rules of evidence were created to prevent juries from being misled. This was not a concern for courts of equity, where juries were not used:[63]

> Courts of equity by the end of the seventeenth century, besides looking more freely at extrinsic facts, had begun to use a writer's extrinsic expressions of intention in a much freer way than courts of law. Adhering to the rule that extrinsic intention must not be used to displace or vary that of the writing, they nevertheless found many ways of using it, and even of using the direct oral expression of it. These courts, having no jury, had not before them, in listening to whatsoever evidence might help them, the apprehension so often expressed by the common-

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[58] *Supra*, n. 2 at 7.

[59] *Supra*, n. 50, at 4, and 34-54.

[60] *Ibid.* at 34.

[61] *Ibid.*

[62] *Wills Act, 1837* 1 Vict., c. 26; Judicature Commission: First Report of the Commissoners no. 4130 (1869); the *Common Law Procedure Acts* of 1852 and 1854; *The Chancery Amendment Act 1858; The Act to Amend the Law Relating to Probate and Letters of Administration in England*, 20, 21, Vict., c. 77 (testamentary causes).

[63] *Supra*, n. 21 at 429-30.

> law judges that "it is not safe to admit a jury to try the intent of the testator." It must be remembered what such a fear at that period meant. Not yet had any distinct system of rules for excluding evidence come into existence. The power of judges to set aside verdicts as being against the evidence had begun to be exercised, but had not got far. The attaint was still the regular way of controlling the jury, and this had practically lost its hold . . . "This is not," said an equity court, in 1708, in considering the question of hearing oral statements of a testator's intention, "like the case of evidence for a jury, who are easily biased by it, which this court is not." In 1736 we read in Bacon's Abridgment that the rule of rejecting "parol evidence . . . to control what appeared on the face of a deed or will . . . has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and to inform the conscience of the court, namely, that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence."

It is probable that the parol evidence rule and the *Statute of Frauds*, both of which restrict the essential question of interpretation to an examination of the writing which records the legal transaction, were created because of the lack of rules restricting the use of a jury. Commenting on the *Statute of Frauds*, Thayer suggests:[64]

> It is not probable that so wide-reaching an act could have been passed if jury trial had been on the footing which it holds today.

Questions respecting interpretation of wills are no longer heard by juries. Nevertheless, these rules, which were developed for juries, still apply.

Objectively interpreting wills disposing of realty answered the needs of "a landholding system which was dependent for its preservation upon certainty of ownership."[65] Under the traditional English system of conveyancing, the validity of past transactions conveying land determined whether the present owner's title was good. Each conveying document in the chain of title was subject to scrutiny. Testamentary dispositions of real property must, to achieve security of title, be susceptible to consistent interpretation. In each subsequent conveyance of the land, the will would be examined to determine whether it had validly passed title.[66]

The preference for objective interpretation of wills is, to a great extent, the result of nineteenth-century jurisdictional questions. The reluctance to use extrinsic evidence to determine intent was not a matter of the courts being unalterably opposed to giving effect to the meaning the words in the will held for the testator, discovered by reference to extrinsic circumstances, but rather one of the integrity of legal title requiring objective determination. For the same reason it was suggested that "the strict rules by which the language of Deeds is interpreted, should be extended to Wills."[67] But this suggestion was rejected by the Real Property Commissioners as being inappropriate for the interpretation of wills.[68]

4. Certainty

While the achievement of certainty is a desirable goal, it is unlikely that it is achieved by objective interpretation. If a disposition is clear in its terms, both objective interpretation and attempting to discover what meaning the testator ascribed to the words he used will achieve certain results. For example, a gift of "$100 to A" is not susceptible to any other construction

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[64] *Ibid.* at 430.
[65] Margaret A. Shane, "The Withering Status of Illegitimacy in Canada Today," (1977) 1 E.T.R. 181, 182.
[66] Megarry and Wade, *The Law of Real Property*, (4th ed.), at 578.
[67] *Supra*, n. 50 at 3.
[68] *Ibid.*

than that A is to receive $100. Problems may arise if more than one possible beneficiary is named A, but under the current law, courts may refer to extrinsic circumstances, including evidence of dispositive intent, to determine whom the testator intended to benefit.

A gift of "my money to A," however, does not make any sense unless extrinsic circumstances are referred to in order to determine what "my money" consists of. Words are used to describe reality, and the meaning of many words depends upon their correspondence to existing circumstances. Certainty is not achieved by ignoring those circumstances. A significant part of those circumstances will consist of direct evidence of the testator's dispositive intent.

F. Conclusion

Nineteenth-century reforms successfully prevented disputes concerning wills from generating multiple proceedings and thereby removed the need for consistent interpretation of one will from court to court in a variety of different suits and actions. Moreover, in British Columbia a modern land title registration system, under which registration is proof of title, has replaced the old English landholding system. The demise of the English system of conveyancing, the centralization of construction questions in one court, and the removal of these questions from jury consideration should have been accompanied by the demise of rules requiring the strict construction of wills.

We have concluded that, on balance, the policy of discovering the meaning the words in the will held for the testator should carry more weight than the policy of construing like wills alike since, in order to achieve the latter policy, it is often necessary to attribute arbitrary and artificial meanings to wills.

G. Reform

1. Admissibility of Evidence

The thrust of the law relating to the interpretation of wills is to limit or exclude extrinsic evidence in order to confine the inquiry to the four corners of the will. Although, as we noted earlier, the law has not yet finally determined whether the objective or subjective approach to interpeting wills should prevail, the bias against evidence of extrinsic circumstances and of the testator's intent is, for the most part, a corollary to the adoption of objective standards of interpretation.

The English Law Reform Committee summarized the law and the reasons for it as follows:[69]

> The broad picture is thus one of construing the words of the will according to their primary meaning, with the total exclusion of any other evidence of the testator's dispositive intention save in the case of equivocations, and a strictly limited admission of extrinsic evidence as to surrounding circumstances and possible secondary meanings of words in case of doubt. This system clearly conduces to certainty in the sense that the volume of material to be construed is severely restricted, and only rarely will any of it consist of oral or affidavit evidence, or, indeed, anything except the will itself. In short, there will rarely be any dispute about what material is to be put before the court in order to determine the effect of the will. On the other hand, however restricted the material and however skilled the draftsman, it is impossible to exclude all disputes in all circumstances.

[69] Law Reform Committee, Ninteenth Report (Interpretation of Wills), 1973, 5.

A majority of the committee concluded that:[70]

> . . . apart from direct evidence of the testator's dispositive intention (which would continue as before to be receivable only in cases of equivocation), extrinsic evidence of any kind should be admissible to assist in the interpretation of a will.

A minority of the English Law Reform Committee recommended that direct evidence of the testator's dispositive intent should also be admissible to assist in the interpretation of a will. As will be seen, the minority view prevailed in England and has been incorporated in legislation in the *Administration of Justice Bill, 1981*.

The Chief Justice's Law Reform Committee of Victoria came to a conclusion similar to that reached by the majority of the English Law Reform Committee. They recommended:[71]

> In the construction of a will acts facts and circumstances touching intention of the testator shall be considered and evidence of such acts facts and circumstances shall be admitted accordingly but evidence of a statement by the testator declaring the intention to be effected or which had been effected by the will or any part thereof shall not be received in proof of the intention declared unless the statement would apart from this section be received in proof of the intention declared.

We agree that evidence of extrinsic circumstances should be admissible in every case to aid the court in interpreting a will. Occasionally, although the meaning of a word, a phrase, or the "dispositive intent" collected from the will may appear to be clear, it will not accord with the testator's actual intention. This happened in *Perrin* v. *Morgan*.

However, we would go further than the Law Reform Committee and the Chief Justice's Law Reform Committee of Victoria. In our opinion the present rules, and the clumsiness of the distinction between patent and latent ambiguity, too often prevent the court from discovering what the testator intended his will to mean. Observations made in the Report of the (English) Council of Justice[72] support this conclusion:

> We think that—at any rate as regards home-made wills—it is the rules of evidence rather than the positive rules of construction which cause most hardship. We think that where a testator has clearly expressed himself in his will it should not be open to a disappointed relative to call evidence to try to prove that he meant something different; but where the will contains a plain ambiguity there is likely to be litigation in any event. Litigation which excludes all direct evidence about the point in issue can only reflect discredit on the legal system. It may be said that the admission of direct evidence is an invitation to fabricate it; this argument is no more valid now than when it was used to support the exclusion of the evidence of the parties in litigation generally.

The English *Administration of Justice Bill, 1981*, recently introduced in the House of Lords, as we mentioned, has followed the approach recommended by the minority of the English Law Reform Commission with respect to the interpretation of wills. Section 21 of that Bill provides as follows:

> 21. (1) This section applies to a will—
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

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[70] *Ibid.* at 18.

[71] Victoria Chief Justice's Law Reform Committee, *Report on the Construction of Wills* (May 1980), App. A, at 9.

[72] British Section of the International Commission of Jurists, (1971).

The effect of subsections (a), (b) and (c) is to require a "peg" upon which extrinsic evidence might be introduced. That approach is designed to avoid problems that might arise if disappointed relations sought to raise issues of interpretation based solely upon evidence of the testator's statements respecting the effect of his will. Only if a question of interpretation arises on the face of the will or by reference to extrinsic circumstances is evidence of the testator's intention admissible to resolve that question. That approach ensures that the language of the will does not become a side issue.

We also note that in New Jersey the courts have reached this position without the assistance of legislative reform:[73]

> Until 1962, New Jersey courts subscribed to the traditional rule which precludes efforts to discover, independent of the will, what the testator meant to say and limits the judicial prerogative to deciding what the testator meant by what he or she said in the will. In *Fidelity Union Trust Co.* v. *Robert* and the decisions that followed, the Supreme Court of New Jersey articulated a fresh approach to the law of will construction. No longer restricting itself to searching out the accepted meaning of the words appearing in the will itself, the court sanctioned the examination of a wide range of extrinsic evidence including the testator's expressions of intent and evidence of "common human impulses" affecting the testator at the time the will was executed. The court stated that its objective in will interpretation cases was to discern what the testator would subjectively have desired if he or she had anticipated the occurrence of the extant contingency. The heart of this innovative doctrine is the court's resolve "to construe a testamentary instrument to achieve the result most consonant with the testator's 'probable intent'."

The New Jersey courts, analyzing will interpretation problems in terms of the testator's probable intent, have recognized that very seldom will extrinsic evidence demonstrate what the testator's actual intent was. Nevertheless, in many circumstances it will be reasonable to give effect to the 'probable intent' of the testator. It should be observed, however, that the New Jersey courts regard direct evidence of the testator's intent with some suspicion. It is not used to control the meaning of a testator's will. It is used to shed light on the testator's directions in his will:[74]

> The Supreme Court of New Jersey has not been without some concern for the manner in which its probable intent doctrine is employed by the trial courts. In rejecting an assertion that the term "securities" as used in a will included real estate, the court admonished that the authority to probe for the testator's probable intent "must be most carefully exercised and should not be utilized unless the court is thoroughly convinced that it is required—the need for its exercise must be 'manifest.' Otherwise its exercise would amount to varying the terms of a will as distinguished from merely effectuating a testator's intent.

We have concluded that this should be the proper approach to the interpretation of a will. We are therefore of the view that evidence of extrinsic circumstances and direct evidence of dispositive intent should be admissible to aid the courts in the interpretation of a will.

2. Whether Litigation Will Increase

It is conceivable that disappointed heirs may be encouraged to contest a will if they are able to adduce evidence of the testator's dispositive intent. But the present rules already provide ample grounds to dispute wills. Evidence in the nature of "he always wanted me to have the house" will not be compelling if no conceivable construction of the will would support that contention. Evidence of the testator's dispositive intent, such as contemporaneous memo-

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[73] Scott A. Smith, "The Admissibility of Extrinsic Evidence in Will Interpretation Cases," (1979) (June-August) Massachusetts Law Review, 123, 126.

[74] *Ibid.*

randa, could resolve many problems presently arising without creating new ones, but their only use would be to aid the court of construction in interpreting the testator's will.

As was observed in the minority report of the English Law Reform Committee:[75]

> It is not suggested that the law should allow direct evidence of the testator's intention to be set up against the plain words of the will itself, or that the court should in any way be empowered to write the testator's will for him. There must be a legitimate "peg" on which to hang the admission of evidence . . . It appears that in [the continental] countries no exclusionary rules of evidence are in force today and the courts consider their task to be to give effect to the testator's intention, however proved, provided there is the necessary peg in the words of the will.

The qualification that the words used in the will must in some way support the construction put forward should sub stantially limit litigation for litigation's sake. In *Haidl* v. *Sacher*,[76] it was said:

> I consider this to be an unfortunate state of the law in that it leads to constructions being placed upon wills which are often contrary to the wishes of the testator. The preferable position, in my view, would be to accept extraneous evidence as to the testator's intentions and to place only such weight upon the evidence as the court considers desirable in the circumstances. One can readily appreciate the pitfalls in situations where competing beneficiaries file conflicting affidavits as to their understanding of the testator's wishes, and in those events little weight should be given to the depositions. On the other hand, it seems to me that a court should be entitled to decide whether or not it wishes to rely upon the affidavit of a solicitor who drew the will explaining his instructions from the testator, that is, the question should be one of weight and not of admissibility.

This approach was approved of in *Re Flinton; Canada Trust Co.* v. *Banks*.[77] Mr. Justice Legg's conclusion, however, appears to be directly contrary to that of the British Columbia Court of Appeal in *Re Klein*.

The time spent in considering extrinsic evidence will often replace the time consumed considering which rule of construction is appropriate, whether a particular rule remains valid today or whether it is overridden by the testator's expressed intention. We do not mean to suggest that the result should be no increase in time spent in litigation, but we do anticipate a trade-off. Another benefit which might reasonably be expected is that increased power to give effect to a disposition in a will as the testator intended, which, in many cases is merely a common sense reading of the will, should reduce the incidence of applications for construction based upon highly technical arguments. Furthermore, a court is able to some extent to control the evidence it will hear. Granting courts a power to hear additional evidence will not deprive the court of its power to exclude irrelevant evidence, or evidence which is inadmissible under other exclusionary rules.

In the Republic of Ireland, the following legislation was enacted in 1965:[78]

> Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will.

It is our understanding that the enactment of the Irish provision has not increased litigation. In one of the rare cases in which the section has received

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[75] *Supra*, n. 69 at 20.

[76] [1978] 5 W.W.R. 199, 201, *aff'd*. (1980) 106 D.L.R. (3d) 360 (Sask. C.A.) *see, e.g., Re Morgan*, (Unreported B.C.S.C. decision), [1980] B.C.D. Civ. 4222-01, *per* McDonald, L.J.S.C.

[77] (1982) 10 E.T.R. 236 (B.C.S.C.).

[78] *Succession Act 1965*, s. 90. The English Law Reform Committee, commenting on this provision, noted:

> . . . it seems that it has so far received little or no judicial consideration. However, it is understood that the section is regarded by at least one judge of the Irish High Court as having already had a beneficial influence . . .

judicial consideration, the courts approached its use cautiously.[79] While very little can be deduced from an absence of judicial consideration, we suspect one explanation is that this reform, rather than impeding the administration of justice, performs a beneficial function. As was observed in the minority report of the English Law Reform Committee:[80]

> Nothing could be more relevant to the construction of a will than the surrounding circumstances at the time it was made; and one of the most important of these circumstances is the testator's intention.

We agree with this observation. In our opinion, even if opening up new areas of admissible evidence may encourage some litigation over the interpretation of wills, this is a small price to pay for increased accuracy in giving effect to the provisions of a will as intended by the testator.

3. Limits of Admissibility

A new problem may arise from expanding the admissibility of evidence for the interpretation of wills. The testator may change his mind concerning the meaning he intended his will to have after he has made the will or, even if his intention remains the same, he may make contradictory statements concerning it.

It should not matter at what times the testator expresses his subjective intent, apart from the will, provided he is consistent. But assume that the testator, on various occasions, makes different statements about the effect of his will, and that his intent changes according to circumstances that arise. Even if the evidence adduced is clear and compelling, it cannot be said that the meaning the testator intended his will to have can be discovered. The courts must then construe the effect of the gift objectively. Allowing the testator's last expressed wishes to control the effect of his will would amount to sanctioning oral variation of wills. Permitting oral variation of wills would open the door to the dangers avoided by the formalities of execution.

The time when the testator's intent is expressed is irrelevant, so long as it is an expression of what the testator intended his will to mean at the time when it was made. But in no event should evidence of that intent override the words of a will. Otherwise a testator could alter, vary, revoke or revive portions of his will orally, without following the required formalities.

Under the present law, admissible extrinsic evidence is confined to the surrounding circumstances known to the testator at the time he made his will.[81] The one exception to this principle is the statutory provision that a will speaks from the testator's death.[82] Professor Feeney describes the effect of this exception as follows:[83]

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[79] The effect of section 90 was considered in *Rowe* v. *Law*, [1978] I.R. 55 (Irish S.C.), where it was narrowly interpreted to mean that extrinsic evidence was admissible to explain a contradiction that appeared on the face of the will, but not to disclose a latent ambiguity.

In that case the testatrix had left her estate (referring to it as the "Trust Fund") to her trustees upon various trusts. One of those trusts consisted of setting aside the sum of £1000 to purchase and furnish a cottage for two beneficiaries, M and G. The testatrix directed that "the balance then remaining" was to be invested and the income paid to M and G, or the survivor of them until his or her death. A further legacy was made to the parish priest, and the residue of the Trust Fund was to be divided between her two brothers-in-law.

The will very clearly indicated that the sum to be invested on behalf of M and G was the balance remaining from the £1000. M and G claimed that "the balance then remaining" referred to the Trust Fund, which consisted of approximately £50,000. The parties attempted to introduce extrinsic evidence to support their respective positions. That evidence was flatly contradictory. It would appear, therefore, that whether section 90 had been narrowly or broadly interpreted, the interpretation of the will urged by M and G should have failed; *see also Bennett* v. *Bennett*, (H.C., Jan. 24, 1977) referred to in *Rowe* v. *Law*, *supra*.

[80] *Supra*, n. 69 at 20.

[81] *See*, *e.g.*, *Re Alcock*, [1945] 1 Ch. 264, where the testatrix bequeathed property to "the three children of my cousin." The cousin had four children. The court held that the gift was to all four children.

[82] *Wills Act*, R.S.B.C. 1979, c. 434, s. 20(2).

[83] *Supra*, n. 2, at 35-6.

> The controlling factor in construing a will, the intention of the testator, is the intention which he had when he executed the will. The surrounding circumstances which are to be taken into consideration are the circumstances which existed at the time of the execution of the will and which were known to the testator. There is a very important exception to this rule. By statute a will is to be construed as to the property comprised in it as of the date of the testator's death. Yet it is a matter of construction of the whole will whether the testator intended a particular clause referring to persons, property, or any other matter, to speak from his death, from the time of his will, or from some other time. As a rule, however, a description of persons or donees is to be read as of the date of the will, while a description of property, whether real or personal, comes under the statutory rule and is to be read as of the date of death.

The provision of the *Wills Act* that, subject to a contrary intention, a will, with respect to the testator's property, speaks from the time of his death, was enacted to bring the law into step with what most testators must intend. It is a statutory rule of construction which replaced the earlier rule that a gift of real estate was confined to property possessed by the testator at the time he made his will.[84] A gift of personal estate included property possessed by the testator at the time of his death.[85] Under the former rule, a gift of "my house" would be construed to mean the house owned by the testator when he made his will, regardless of whether the house had been sold and replaced by another. Clearly the statutory rule more nearly corresponds to what most testators must intend when they make general gifts.

H. Comment and Recommendation

In our Working Paper we proposed that:

> The *Wills Act* be amended to provide that relevant direct or indirect evidence, including evidence of the testator's dispositive intent, is admissible to assist in the interpretation of a will.

The chief concern shared by many of our correspondents was that legislation based upon the proposals in the Working Paper would go too far. Our conclusion that courts should interpret the terms of a will in order to give effect to it as the testator intended when he made his will, rather than interpret wills objectively, was seen by some as a suggestion that the will itself should have little importance and that courts should attempt to discover and give effect to the testator's intent even if it was not recorded in the will. That result was neither intended nor proposed by the Commission.

A will is the only record of the testator's intentions, and the courts must give effect to the directions contained in that will. If, as occurs from time to time, the will is ambiguous, either on its face or by reference to extrinsic circumstances, the courts should seek to discover what meaning the testator ascribed to the words he used in his will. For that purpose, the evidence the courts may consider should not be limited.

One of our correspondents wrote:

> On balance I am not totally convinced that the recommendation will indeed make it easier for a court to get at the testator's intention for the evidence that might well resolve the difficulty will not be available. Conversely, while granting that the language of the will is often the source of the problem, I think that one should be careful not to go so far in admitting external evidence that the language of the will itself becomes something of a side issue.

Our aim was not to provide a solution to all interpretation problems. That cannot be done. Our goal was to ensure that the courts had adequate tools to

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[84] *Jarman on Wills*, (6th ed., 1910) at 404 *et seq.*
[85] *Ibid.*

deal with those problems. In that respect, our proposal was aimed at ensuring that the courts had available to them all relevant evidence on issues raised.

A number of our correspondents agreed that direct evidence of dispositive intent should be admissible. One group wrote:

> We think that the arguments against this kind of evidence in a contract case are not compelling in a wills case because evidence of what one party to a contract intended does not go any distance as to what the other party intended or what the intent should be that is reflected in the contract, whereas there is only one intent in a wills case. The situation is so common of a testator doing things in his will that are quite contrary to the things that he tells his friends and family that he is doing, that we think it would be a very rare case where direct evidence of the testator's dispositive intent will carry any weight whatsoever where the will itself is clear. However, we do not see any reason why you should further complicate your recommendations by making it a preliminary to the introduction of such evidence that there be an ambiguity, patent, latent or otherwise.

Most of those correspondents who were initially opposed to the proposal, were not so much opposed to the admissibility of direct evidence of dispositive intent, as to the uses to which they suspected that evidence would be put. They were concerned that the courts would attempt to give effect to an intention expressed orally by the testator, but which, upon no reasonable construction, could be supported by the will. At meetings with interested and expert persons the Commission clarified that the only use which should be made of such evidence was to aid the courts in the interpretation of the will itself, and that that was what was meant by the concluding words of the proposal "to assist in the interpretation of wills." A majority of those present at the meetings agreed that that approach was unobjectionable.

To avoid any possibility of confusion, we think the principle, that the court's primary function when interpreting a will is to give effect to the will itself, should be contained in legislation enacting our other recommendations. Those recommendations are designed only to assist the courts in determining what the testator meant by the words in his will, not to encourage courts to arrive at interpretations the testator did not intend his will to have.

The Commission recommends that:

1. Legislation should be enacted to confirm that the courts' primary function when construing a will is to give effect to the testamentary directions contained in the will.

As we mentioned, the proposals in the Working Paper were not designed to violate that principle. They are significant only in order to determine what meaning the testator intended his will to convey when he made it.

Our principal concern was to encourage courts to construe wills more liberally so that provisions which are obscurely framed would not be subject to rigorous or strict construction achieving results not intended by the testator. As we mentioned earlier, strict construction was a creation of the courts of the 18th and 19th centuries. Prior to that period, evidence was more readily admissible to aid the court of construction and the courts were more willing to inquire into what the language used by the testator meant to him. Special reasons, which no longer apply, made strict construction desirable, even though the result was often to distribute the deceased's estate in a way he did not intend. It was thought that by removing technical rules respecting the admissibility of evidence, the courts would find it an easier task to interpret wills. Obviously, this reform is significant only in cases where there is relevant extrinsic evidence.

Our ambitions with respect to proposal 1 were relatively minor. It was not thought that all problems of construction would be resolved by modifying rules of admissibility. Two beneficial results were anticipated:

(1) that the courts would no longer have to enter into the sterile debate of whether an ambiguity was patent or whether it was latent to resolve whether evidence was admissible; and

(2) that all relevant evidence respecting the meaning of the language in the will was before the courts.

It is difficult to see how permitting the courts to consider relevant evidence will in any way impair the significance of the will itself. We remain convinced that these are desirable goals to accomplish. Nevertheless, we have modified our original proposal to clarify that extrinsic evidence may only be used to determine the meaning the testator ascribed to the words used in his will. It should not be used to come to a construction not supported by the terms of the will itself.

The Commission recommends that:

2. Legislation should be enacted to provide that relevant evidence, including statements made by the testator or other evidence of his intent, is admissible to determine the meaning the testator, when executing his will, attached to the words used therein.

I. Summary

The present rules which dictate when extrinsic evidence is admissible to aid in the construction of a will are neither straightforward nor consistent. In order to interpret a contested will with accuracy, evidence of extrinsic circumstances should be admissible in every case. Such evidence should also include evidence of the testator's intent. In a case in which evidence of the testator's intent will be neither compelling nor reliable, the courts can be trusted to determine the weight it should be given. There is no need for a blanket exclusion of such evidence.

Evidence of the testator's intent is not a substitute for the testator's will. Together with the words used in the testator's will, the intent thereby expressed, the context in which the words are found and the intent collected from the whole of the will, an untrammelled ability to hear evidence would be only a part of an integrated approach to interpretation, enabling the courts to discover and to give effect to the meaning the testator intended his will to convey, provided always that the wording of the will is consistent with that construction.

CHAPTER III THE RULES OF CONSTRUCTION

A. Introduction

In Chapter II we mentioned that the common law developed rules of construction to aid in the interpretation of wills. Our conclusion that the courts should be permitted to resort to extrinsic evidence when interpreting wills brings into question the utility of the rules of construction. The rules of construction raise initial presumptions concerning the meaning of words used by a testator.[1] For the purposes of our discussion we have divided these rules into two groups: those rules which are of general application, providing the court with guiding principles, and those which pertain to specific wording.

B. General Rules of Construction

General rules of construction do not so much fix the meanings of specific words as provide the court with guiding principles of construction. As such they are fairly flexible and seldom interfere with discovering what effect the testator intended his will to have. In fact, they are so flexible that some conflict. For example, it is a rule of construction that a will should be construed to avoid an intestacy,[2] subject to the rule that those entitled on intestacy are not to be deprived of their statutory rights other than by express words or clear intention gathered from the will.[3] In operation, these rules encourage courts to seek out the meaning the testator ascribed to the words he used in his will and to give effect to it. Very little can be said against retaining such rules.

Similarly unobjectionable is the rule that a legal consequence is preferred over one which is illegal or offends a rule of law,[4] even when it can be shown that the testator did not know the effect in law of what he has directed.[5] If the testator intended a consequence, that he did not realize was illegal, application of the rule may still save the gift.

Although a sensible intention is preferred over one that is capricious,[6] it is recognized that testators can be unreasonable, whimsical and, within certain limits, irrational.[7] If there is any uncertainty in a gift, for example, to children[8] or to kin of equal degree,[9] it is presumed that the testator intended to benefit each member of the class equally. If there is any uncertainty in a gift to kin of unequal degree, it is presumed that the testator intended to favour nearer kin over more distant relatives.[10] These rules operate only as guides to interpretation and, consequently, encourage the courts to discover the effect the testator intended his will to have.

Other general rules of construction are more arbitrary and allow the courts less scope for interpretation to discover what the testator meant. For

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[1] *Limpus* v. *Arnold*, (1884) 15 Q.B.D. 300; *Re Speakman*, (1876) 4 Ch. D. 620; *Re Hammond*, [1934] S.C.R. 403; *Singer* v. *Singer*, [1932] S.C.R. 44; *Re Browne*, [1934] S.C.R. 324.

[2] *Re Biln Estate*, (1967) 59 W.W.R. 229, 61 D.L.R. (2d) 525 (Alta. S.C.); *Re Harmer*, (1964) 46 D.L.R. (2d) 521 (S.C.C.); *Re Brule*, [1928] 1 W.W.R. 308 (Man. K.B.); *Re Johnstone*, (1966) 55 W.W.R. 167 (B.C.S.C.); *Re Passmore*, (1964) 49 W.W.R. 588 (Alta. S.C.); *Re Power*, (1964) 48 W.W.R. 250 (B.C.S.C.).

[3] *Ibid.*

[4] *Martelli* v. *Holloway*, (1872) L.R. 5 H.L. 532, 42 L.J. Ch. 26; *Re Johnson*, [1963] 1 O.R. 366 (H.C.); *Re Burke*, (1959) 20 D.L.R. (2d) 396 (Ont. C.A.).

[5] *Re Carter*, (1918) 42 O.L.R. 57; *Re Hetherington*, [1945] 3 W.W.R. 270 (B.C.S.C.); *Lottman* v. *Stanford*, (1980) 107 D.L.R. (3d) 28, 6 E.T.R. 34, 31 N.R. 1 (S.C.C.).

[6] *Thellusson* v. *Rendlesham, (Lord)*, (1859) 7 H.L. Cas. 429, 497, 11 E.R. 172, 198; *Re Allsop*, [1968] Ch. 39.

[7] *Re The Estate of Brocklehurst, dec'd.*, [1978] Ch. 14 (C.A.).

[8] *Hauck* v. *Schmaltz*, [1935] S.C.R. 478, [1935] 3 D.L.R. 691.

[9] *Re Adams Estate*, [1957] O.W.N. 568 (C.A.); *Re Alcock*, [1945] 1 All E.R. 613 (Ch.).

[10] *Coard* v. *Holderness*, (1855) 20 Beav. 147, 52 E.R. 559, *Re Rigetti Estate*, [1950] 1 W.W.R. 529 (Sask. K.B.).

example, recurring words are taken to have the same meaning,[11] and in the case of irreconcilable gifts, the last is presumed to prevail.[12] But even these rules do not prevent the courts from attempting to glean the testator's intentions since against them can be set other general rules. For example, the meaning of a word is controlled by its context,[13] and so the meanings of recurring words may vary. The last of two irreconcilable gifts will not prevail in a variety of cases, for example, if an intestacy would result,[14] or there is an intent to give a moiety,[15] or there is a construction which recognizes the reasonable expectations of persons having claims against the testator's bounty.[16] Another rule which assists in giving effect to the testator's intent is that if a consistent scheme of distribution is apparent from the will, doubtful portions must be construed to accord with that scheme.[17]

On the whole, the general rules of construction are useful aids to interpretation. Although arbitrary in nature, they do not necessarily restrict the court from seeking the meaning the testator intended his will to have and giving effect to it. In many cases they confirm the court's flexibility to interpret the testator's will.

C. Specific Rules of Construction

Specific rules of construction have a quite different effect on the interpretation of wills than do general rules of construction. Because specific rules impose upon certain words or phrases a somewhat firm interpretation, these rules may discourage a court from searching for what the testator actually meant. They provide objective standards which may not only reflect what many people using certain words would mean, but also provide an easy substitute for inquiry into what the testator might have meant in the will in question.

Specific rules of construction are too numerous to list here, nor is much to be gained by discussing each one and demonstrating how it may frustrate a testator's intentions. The following examples should suffice to illustrate the arbitrary nature of these rules.

The so-called rule in *Sibley* v. *Perry*[18] provides that when the word "issue" is used in conjunction with words denoting "parent" as the first taker, it means "children" of that parent. If a testator makes a gift, for example, to "my three sisters or their issue" one might suppose that, if all three sisters predecease the testator, subject to the class closing rules, any child, grandchild, etc., of the sisters alive at the testator's death would share in the gift. But the effect of the rule is to restrict the gift to children of the sisters, unless a use of the word "issue" elsewhere in the will enlarges the construction. If only grandchildren of the sisters survive the testator, the gift may lapse.[19]

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[11] *Middleboro*, v. *Ryan*, [1925] S.C.R. 10, [1925] 1 D.L.R. 589; *Gairdner* v. *Gairdner*, (1882) 1 O.R. 184; *Tarbutt* v. *Nicholson*, [1920] 1 W.W.R. 769 (P.C.); *Re Jenkins*, [1954] 2 D.L.R. 268 (B.C.S.C.); *Re Beard*, [1950] O.W.N. 421.

[12] *Re Bywater*, (1887) 18 Ch. D. 17; *Re Hammond*, [1938] 3 All E.R. 308; *Re Gult*, (1957) 12 D.L.R. 140 (B.C.C.A.); *Nimmo* v. *Adams*, [1921] 1 W.W.R. 733, 29 B.C.R. 277, *aff'd* [1922] 1 W.W.R. 1284 (B.C.C.A.); *Re Ley*, (1912) 2 W.W.R. 790, 17 B.C.R. 385, 5 D.L.R. 1 (C.A.).

[13] *Supra*, n. 11.

[14] *Piper* v. *Piper*, (1887) 5 N.Z.L.R. 135.

[15] *Re Alexander's Will Trusts*, [1948] 2 All E.R. 111; *Re Richardson*, (1921) 20 O.W.N. 241.

[16] *Re Maillioux*, (1918) 14 O.W.N. 85.

[17] *Re Davey*, (1910) 17 O.W.R. 1034, 2 O.W.N. 467; *Re Cleghorn*, [1931] 2 D.L.R. 865 (Ont. S.C.-A.D.); *Stoddard* v. *Williams*, [1923] 1 W.W.R. 688, 32 B.C.R. 43, [1923] 1 D.L.R. 1113 (B.C.S.C.); *Re Burns*, [1924] 1 W.W.R. 109, [1924] 1 D.L.R. 721 (Alta. S.C.); *Re Slack, Bieber* v. *Coleman*, [1972] 5 W.W.R. 700 (Sask. Q.B.); *Re McNaught*, (1919) 17 O.W.N. 355; *Sturn* v. *Lettner*, (1980) 98 D.L.R. (3d) 700 (S.C.C.); *Re Helmcken*, [1924] 3 W.W.R. 172, 34 B.C.R. 184 (B.C.S.C.); *Re Speakman*, (1876) 4 Ch. D. 620; *Re Denton*, [1912] 5 D.L.R. 626 (Ont. D.C.).

[18] (1802) 7 Ves. Jun 522, 32 E.R. 211.

[19] *Re Sinclair*, [1963] 1 O.R. 335 (H.C.).

A testator may make a gift to "the children of A and B." Unless A and B are parents of the same children, the gift is ambiguous since it may mean either that the children of A and the children of B, or that B and the children of A, are to be benefitted. The rule in *Re Dale*[20] indicates that the latter construction is preferred. The other construction is equally likely to represent the testator's intention.

There are many other specific rules of construction. The following are examples of the *prima facie* meanings that certain words are presumed to hold: a gift to "children" does not include grandchildren;[21] a gift to "grandchildren" does not include great-grandchildren;[22] a gift to "cousins" includes only first cousins;[23] a gift to the "family" of a person includes only his children.[24] The restricted primary meanings of these words may make construction an easier or more convenient task, but they limit inquiry into what the testator intended the words to mean.

In order to resolve the problem of when a gift is to vest, courts have developed a bewildering array of rules. Distinctions are often made upon subtle differences of wording, and the resulting constructions often bear no relation to what the testator must have intended, or what a common sense reading of the will would suggest. For example, devises to A "if," "when," "upon," "as he shall attain," or "from and after" his attaining a specific age, although the words themselves are not determinative, have been held to create a contingent interest (one that will not vest until the contingency is met).[25] A devise which, in a separate direction, is to "take effect" upon A's attaining a specific age has been held to be vested subject to being divested. So, too, a devise "to A unless he fails to attain 21 and then to B" has been held to be vested subject to being divested.[26] The different effects of these two constructions may be quite far reaching: while a contingent gift may offend the rule against perpetuities, one which is vested subject to divestment will not. The donee of a contingent gift is not entitled to income; the donee of a gift which is vested subject to divestment is so entitled.

As a last example, the testator may make a gift to "my children." The *prima facie* rule is that only legitimate children are intended to take.[27] Again, the meaning is determined without regard to the testator's intention. The testator may have intended to benefit illegitimate children as well.

Concerning the origins of specific rules of construction, Holdsworth has written:[28]

> . . . the prevailing idea at this period [during the sixteenth and seventeenth centuries when rules for the construction of particular expressions used in deeds and wills increased and multiplied] was that "the words of a legal document inherently possess a fixed and unalterable meaning"; and the cases which lay down these rules were, to a large extent, the product of this idea. In fact, it was thought to be dangerous to allow the expressions used by the parties to any written instrument to be interpreted by other than fixed rules. These expressions, it was thought, always ought to have the same fixed meaning. The meaning which a case had put upon an expression must be always adhered to, as if the case assigning that meaning had laid down a rule of law; and, though intent must be considered, "it must be according as it appears upon the will, and according to the known rules of

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[20] [1931] 1 Ch. 357.

[21] *Radcliffe* v. *Buckley*, 10 Ves. Jun 195, 32 E.R. 819; *Pride* v. *Fooks*, 3 De. G. & J. 252, 44 E.R. 1265.

[22] *Lord Orford* v. *Churchill*, 3 V. & B. 59, 35 E.R. 401.

[23] *Staddart* v. *Abingdon*, 10 W.R. 591.

[24] *Barnes* v. *Patch*, 8 Ves. Jun 604, 32 E.R. 490; *Gregory* v. *Smith*, 9 Hare. 708, 68 E.R. 698.

[25] *Theobald on Wills*, (13th ed., 1971), para. 1412; *Williams on Wills* (2nd ed., 1961), at 566; *see, e.g., Phipps* v. *Ackers*, (1842) 9 Cl. & Fin. 583, 8 E.R. 539 (H.L.); *Mallinson's Consolidated Trusts*, [1974] 1 W.L.R. 1120.

[26] *Ibid.*

[27] *Hill* v. *Crook*, (1873) L.R. 6 H.L. 265 (H.L.).

[28] Holdsworth, *A History of English Law*, Vol. VII, 393-4.

> law; it is not to be left to a latitude, and as it may be guessed at." As these rules grew in number and elaboration, less scope was given for a consideration of the real intentions of the parties, with the result that, according to the admission of the judges themselves, these intentions were often disregarded.

As the examples indicate, the specific rules of construction determine the meanings of various words used by the testator without regard to the meaning he attached to them. When ambiguous testamentary directions provide no guide to what effect the testator contemplated they should have, the use of specific rules of construction may be convenient. However, when the deceased's testamentary intent can be determined, and yet he has not made provisions which clearly prevent the operation of the applicable rule or rules, the courts are placed in an invidious position. Either they must adopt an arbitrary meaning which they know will frustrate the testator's wishes, or they must find some means of evading the rules of construction.

The force and effect of some rules of construction has been eroded over the years. For example, the rule in *Sibley* v. *Perry* (mentioned above) is now easily displaced. In both *Re Manly's Will Trusts*[29] and *Re Spencer*,[30] the courts, when called upon to construe a will, interpreted the word "issue" without regard to any presumption concerning its *prima facie* meaning. Similar observations can be made about many other rules of construction. Holdsworth describes the gradual change in the use of rules of construction, as follows:[31]

> At the same time, the courts themselves have set their faces against the manufacture of new rules of construction; they have revised some of the older rules which had grown up during the eighteenth century—notably the rules as to the circumstances under which a trust would be inferred from precatory words; and, while recognizing old established and existing rules, they no longer think that the consideration of lines of more or less analogous cases is a necessary preliminary to the ascertainment of the intentions of the framer of the document which is before the court. In other words, they have come to recognize the distinction between a rule of construction and an inference of fact as to the meaning of a particular document.

Concerning "the modern judicial reluctance to be bound by traditional rules," C.H. Sherrin has made the following observations:[32]

> . . . traditional named rules which have not been applied in recent cases include the rule in *Gundry* v. *Pinniger*, not applied in *Re Gansloser's Will Trusts;* the rule in *Brown* v. *Lord Kenyon*, not applied in *Re Douglas Will Trusts*, and the rule in *Lassence* v. *Tierney*, not applied in *Re Goold's Will Trusts* . . . Similarly one can cite other modern cases where prima facie rules of construction were not followed, for example: *Re Jeeves* (not following prima facie rule of per capita division); *Re Ransome, dec'd.* (deciding against the policy of early vesting); *Re Herwin* (illegitimate children included contrary to the prima facie rule); *Re Levy, dec'd.* (prima facie rule in *Phillips* v. *Chamberlain* that the capital of the residue passes by implication where the interest is given not followed); *Re Jebb, dec'd.* (prima facie meaning of "children" being legitimate children, and not illegitimate or other kinds of children, departed from); *Re Clanchy's Will Trusts* (prima facie rule that next-of-kin are to be ascertained at the death of the testator, not followed); *Re Drake's Will Trusts* (prima facie rule that "male descendants" is a term of art, not followed).
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> However, one must not seek to give the impression that rules of construction are never applied in modern cases.

In fact, in many cases the rules of construction continue to be applied. The presumption that "children" means legitimate children, for example, is

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[29] [1969] 3 All E.R. 1011.
[30] [1974] 1 W.W.R. 509 (B.C.S.C.).
[31] *Supra*, n. 28, 395.
[32] "The Wind of Change in the Law of Wills," 40 Conv. 66, 73-4.

seldom rebuttable. The rules are said to be "so firmly established as to compel adherence."[33]

D. The Effect of Rules of Construction

When a rule of construction applies, and the force of the presumption it raises, are not altogether certain. Courts may take different approaches, and find ample precedent to support whatever course they adopt.

A rule of construction may fix the ordinary meaning of a word and prevent further inquiry into the testator's intent.[34] When this occurs, an arbitrary construction prevails over interpretation according to the deceased's ambiguously expressed testamentary intent.[35] A common example is a gift "to the children of A." According to the rule in *Andrews* v. *Partington*,[36] the class closes at the testator's death, if there are any lives then in being, and any afterborn children of A are excluded. The testator may have intended to benefit all of the children of A, but no inquiry may be made to ascertain whether that construction of the words used in the will was intended by the testator.

A rule of construction may determine the *prima facie* meaning of a word or words, which may then be rebutted by extrinsic evidence.[37] What constitutes sufficient evidence for the purpose of rebutting a *prima facie* meaning is also uncertain. Sometimes the evidence need only suggest a reasonable meaning and indicate that the *prima facie* meaning is unreasonable.[38] For example, if the evidence discloses that only illegitimate children are alive, then the presumption that a gift "to my children" includes only legitimate children is rebutted.[39]

Another example is to be found in *Canada Permanent Trust Co.* v. *Guinn*.[40] In that case the testator's executrix was bequeathed a legacy which was larger than any other legacy made in the will. The usual rule is that, unless the will otherwise directs, a legacy to an executor is made in lieu of remuneration for administering the estate. In *Guinn*, the petitioner trust company was a co-executor, and presumably performed the bulk of administrative duties. The court, however, considered extrinsic evidence which indicated that the respondent had been a long-time friend of the testator as well as business associate. The court held, therefore, that the respondent was entitled to both the legacy and remuneration for executor duties. Since one construction is as appropriate as the other, we think the courts should weigh extrinsic evidence to determine whether a rule of construction is appropriate. That evidence need only indicate what the testator's intention might have been. It need not prove conclusively what that intention was.

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[33] *Falkiner* v. *Commissioner of Stamp Duties*, [1973] A.C. 565, 578 (P.C.); *see also Re Bleckly*, [1951] Ch. 740, 751 (C.A.), Holdsworth, *supra*, n. 28, at 396.

[34] *Higgins* v. *Dawson*, [1902] A.C. 1 (H.L.); *Josiak* v. *Setler*, (1971) 16 D.L.R. (3d) 490 (Ont. H.C.); *Re Glasgow*, [1940] O.W.N. 335; *Charter* v. *Charter*, (1874) L.R. 7 H.L. 364; *Re Thompson*, (1968) 65 W.W.R. 702 (B.C.S.C.); *Re Cross*, 51 W.W.R. 377 (B.C.S.C.); *Re Mayo*, [1901] 1 Ch. 404; *Re Hodgson*, [1936] Ch. 203; *Re Bennett*, [1955] O.W.N. 211 (H.C.); *Theobald on Wills*, (13th ed.), para.427.

[35] *E.g. Higgins* v. *Dawson*, *ibid.*

[36] (1791) 3 Bro. C.C. 401, 29 E.R. 610.

[37] *Perrin* v. *Morgan*, [1943] A.C. 399 (H.L.); *Haidl* v. *Sacher*, (1980) 106 D.L.R. (3d) 360 (Sask. C.A.); *Re Horinek*, (1980) 6 E.T.R. 21 (Man. Q.B.).

[38] *Re Cockle's Will Trusts*, [1967] Ch. 690.

[39] *Hill* v. *Crook*, (1873) L.R. 6 H.L. 265; *Re Seibel*, (1925) 20 Sask. L.R. 190, [1925] 4 D.L.R. 923 (C.A.); *Re Jebb*, [1966] Ch. 666 (C.A.); similarly, a gift to children will not include step-children: *see, e.g., Re Gosselin*, (Unreported Ont. Surr. Ct. decision), Apr. 6, 1981, *per* Murphy, Surr. Ct. J. However, courts that attempt to discern the testator's intention and not the objective meaning of the words, will construe such a description more liberally: *see, e.g., Re Alward*, (Unreported Alta. Surr. Ct. decision), Feb. 10, 1981, *per* Prowse, Surr. Ct. J.

[40] (1982) 10 E.T.R. 256 (B.C.S.C.).

Sometimes the presumption may be rebutted only by clear and compelling evidence[41] or by express contrary intention contained in the will.[42] Lastly, the *prima facie* meaning may be tested, not with regard to the testator's intent, but against present policies and social attitudes to see if the meaning so controlled is still valid.[43] This was the approach taken by Manson, J. in *Re Hogbin*.[44] However, this approach is disapproved of by commentators[45] and is usually rejected by the courts[46] on the ground that the arbiter of policy and social attitudes is the Legislature.

Occasionally it is said that a rule of construction may be applied only if the meaning of words in a will remains uncertain after construing the will with reference to extrinsic circumstances.[47] Of all the various approaches, this is the most sensible if the courts are to be able to discover the meaning the testator intended his will to have. However, even if the courts are at first free to determine the meaning the testator attached to the words in his will, reference to a time-honoured rule of construction may often cause that interpretation to give way to an objective standard. The case of *Sturn* v. *Lettner Estate* mentioned in the previous chapter is representative of the general problem. There the testator's intention to benefit the plaintiff was clearly expressed in the will, and yet the lower courts found it extremely difficult to give effect to this intention because of the apparently contrary meaning of the words used to make the gift. The use of the rules of construction presents a more difficult problem: the words used by the testator may support the meaning attached to them, and yet an arbitrary presumption raised by the rules will prevent the courts from giving effect to that intention.

E. Reform

As we have discussed, in many cases the rules of construction guide the courts to objective interpretations of wills, sometimes by arbitrarily preferring one meaning over another, at other times by limiting or discouraging inquiry into the deceased's testamentary intentions. The reasons for preferring an objective interpretation over the meaning the testator intended the words to bear are no longer of sufficient weight to justify the continuation of literal and objective interpretation of wills. However, certain advantages are obtained from the use of the rules of construction which, to some,[48] militate in favour of their retention.

As an adjunct to literal interpretation, the rules promote certainty of interpretation. A legal adviser may rely upon particular words to obtain a specific result. Consequently, it is said,[49] they also facilitate accurate drafting and economy of expression.

When the testator fails to provide for events which occur, in many cases "the court is relieved from a purely impressionistic interpretation."[50] The rules also promote the appearance of justice because an unsuccessful litigant:[51]

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[41] *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483, *Limpus* v. *Arnold*, *supra*, n. 1; *Re Hodgson*, [1936] Ch. 203.

[42] *E.g.*, although rules of construction are subject to manifest intention, rules of convenience are subject only to specific contrary direction: *see Williams on Wills* (2nd Ed., 1961), at 355.

[43] *Re Hogbin*, [1950] 2 W.W.R. 264, [1950] 3 D.L.R. 843 (B.C.S.C.).

[44] *Ibid.*

[45] Winnifred Holland, "Gifts to Children by Will: The Effect of Illegitimacy," (1980) 6 E.T.R. 21, 23.

[46] *Re Horinek*, *supra*, n. 37.

[47] *Re Manly's Will Trusts*, *supra*, n. 29; *Singer* v. *Singer*, *supra*, n. 1; *Re Browne*, *supra*, n. 1.

[48] *See, e.g.*, Victoria Chief Justice's Law Reform Committee, *Report on the Construction of Wills* (May, 1980), App. A, at 1-2; *Folkiner* v. *Commissioner of Stamp Duties*, *supra*, n. 33.

[49] *Ibid.*

[50] *Ibid.* at 577.

[51] *Ibid.*

> . . . will at least have the consolation of knowing that his case has been adjudged by an objective standard, which has been applied in the past to others in a similar situation to his, and which will be so applicable to others in the future.

The Chief Justice's Law Reform Committee of Victoria considered whether to recommend the abolition of the rules of construction. They decided against abolition for the following reasons:[52]

> 3.1 First, we would not be completely certain what the acceptance of such a proposal would entail. There are many rules of construction of wills; some are perhaps more compelling than others. It could prove a source of embarrassment if sweeping legislation were enacted abrogating rules of construction and it subsequently emerged that unforeseen difficulties arose out of the abolition of a hitherto significant rule of construction, the operation of which had not been specifically considered by the sub-committee.
>
> 3.2 But, more fundamentally, we believe that, fairly applied, the testamentary rules of construction are of great value . . . We proffer the following reasons:
>
> (a) Decision by rule is calculated to minimize costly and fruitless litigation and to provide draftsmen of wills with a measure of confidence as to the meanings which courts will ascribe to certain expressions. We consider that litigation would increase significantly if the rules of construction were abolished.
>
> (b) A particular, recurring problem of construction often involves policy factors and strong probabilities of intention which coincide sufficiently to make one construction, in terms of the results it tends to produce, preferable to other permissible constructions.
>
> (c) Criticism of the effect of particular rules should not be confused with a criticism of the usefulness of rules of construction generally.
>
> (d) The rules of construction are especially useful in those recurring situations in which the cases are similar in language and context and where the testator apparently formed no actual intention. Perhaps it can be said that "The function of a rule of construction is to supply a result where no actual intention is discoverable": Halbach, *"Stare Decisis* and Rules of Construction in Wills And Trusts" (1964) 52 California Law Review 921, 932. See also *Falkiner* v. *Commissioner of Stamp Duties* [1973] A.C. 565 at 577.

We do not find these arguments totally convincing.

If a draftsman is aware of a particular rule, he may prepare the will in order to avoid the pitfalls it presents. However, the technical and sometimes obscure rules that may apply promote the possibility of error, not accuracy. Moreover, it would be unwise for a draftsman to rely upon a rule of construction because there is no guarantee that the courts will apply it. The cases demonstrate that the courts are adept at finding their way around awkward results required by the rules. And even if a draftsman does rely upon a rule of construction, achieving some form of economy of expression, it is often at the cost of clear expression in contemporary language. If a testator directs his draftsman to make a gift to the legitimate children of A, is anything gained because the draftsman can use the words "A's issue" knowing that the rule in *Sibley* v. *Perry* and the rule in favour of legitimacy should bring the courts to the intended construction?

When the testator fails to provide for events which occur, an arbitrary rule may or may not be useful. It is unlikely that an unsuccessful litigant, however, will derive much consolation from the knowledge that, in other cases, the courts are consistent in applying rules of construction to ambiguous words to reach an arbitrary interpretation rather than determining what meaning is appropriate in the circumstances. As Holdsworth observes:[53]

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[52] *Supra*, n. 48, at 1.

[53] *Supra*, n. 28, at 394.

> No doubt in so acting the court did substantial justice in many cases. But there was a very considerable danger involved in pursuing this course, especially in a system which recognized the binding force of decided cases. Decisions as to the true construction of the ambiguous words of one testator were cited as authorities for putting a similar construction upon the ambiguous words of another testator; and, because the words were ambiguous and the expressions loose, this practice did more harm than when applied to documents which were formal and complete.

The argument that the rules "minimize costly and fruitless litigation" is also suspect. It is likely that the rules, if they do not promote litigation, tend to prolong it. If the courts are faced with an absurd meaning or result prescribed by a rule of construction, or a meaning contrary to the meaning the testator intended them to have, there is no certainty as to whether the courts will submit to the rule or find some way around it, for example, by finding "clear" contrary intention,[54] or by finding that the meaning required by the rule is opposed to the context in which the words are found,[55] or by raising another rule of construction.[56] The remarks of Lord Greene, M.R., with reference to the rule dictating the narrow meaning of "money," are applicable generally:[57]

> Indeed, one of the vices of a rule such as this is that it induces a tendency, which is often very attractive to the judicial mind, to endeavour by some very subtle and sometimes over-subtle distinctions, to construe a will in such a way as to get out of the rule.

The result is that litigation may not focus upon the true issue in dispute—the meaning the testator intended his will to have—but upon how an arbitrary meaning should be determined. In our opinion, seeking the actual meaning the testator intended his testamentary instructions to have should not increase litigation. Even if it does, this is a reasonable price to pay for giving effect to the deceased's testamentary intent.

The argument that rules of construction implement policy is equally misleading. In many cases, the policy being promoted is some centuries out of date. In light of modern attitudes toward common law marriages, this is certainly true of the presumption against favouring illegitimate children. It is also true, for example, of some of the early vesting rules, which were designed in part to avoid the possibility of an abeyance of seisin, a concept which no longer figures in modern law. If the rules did change with the times, there might be some merit in the argument that they promote policy. As we have seen, the courts are reluctant to vary the rules to accord with changed policy and social attitudes. It was observed quite long ago that:[58]

> . . . the fixed and binding rules of construction which are applied in the construction of wills lead to manifest injustice. These rules are judge-made, and their history shows that they began as rational guides based on experience, but in time they have altered their character. As rational guides they may still be of value, although in certain instances the experience of the past is contradicted by the facts of present day life, but as rigid rules they can only lead to injustice.

We have concluded that the rules of construction should not be retained in their present form, but we are reluctant to recommend that they should be abolished. The likely consequences of such an action would not be beneficial. In many cases the testator will have formed no intention whatsoever concerning technical matters that will arise in any administration; for example, he will not have considered the vesting of a gift to be a problem, nor have foreseen that difficulties may arise between life tenants and remaindermen. If

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[54] *Re Cockle's Will Trusts*, *supra*, n. 38.
[55] *Perrin* v. *Morgan*, *supra*, n. 37.
[56] *Perrin* v. *Morgan*, [1942] Ch. 345, 347 (C.A.).
[57] *Ibid.*
[58] Comment, 6 L.Q.R. 150.

the rules were to be abolished, a vacuum would ensue and the courts would have to set about creating rules of construction anew.

One alternative is to review the rules of construction individually in order to suggest specific reform. There are several reasons against pursuing this course. First, in time, as values and policies change, the law would become again much as we find it now, with the courts applying antiquated rules to arrive at objective interpretations. Second, the evil of the rules of construction is not that the meanings they prescribe are unreasonable, but that they are arbitrary. In our opinion, a rule of construction should never prevail over the meaning the testator intended his will to have, if that meaning is discoverable. The rules should function as "little more than ordered lists of examples"[59] consulted only as a last resort.

F. Recommendation

We concluded in Chapter II that objective interpretation is not always appropriate for the construction of wills. The rules of construction are an aid to objective interpretation. If the courts are to give the testator's will the effect he intended it to have, the rules of construction can have no place in the inquiry, except perhaps as guides to correct interpretation. We agree with the Earl of Halsbury, L.C., when he said:[60]

> I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rules for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole.

In our opinion, recommendation 2 will have the effect of displacing many of the rules of construction and of enabling the courts more easily to avoid inconvenient rules. To confirm the role that rules of construction should play in the interpretation of wills, we proposed in our Working Paper that:

> The *Wills Act* be amended to provide that if the court is unable to elicit the testator's intent from his will or from relevant direct or indirect evidence, including evidence of the testator's dispositive intent, the court may have regard to the rules of construction, but should decline to apply them if they would, in all the circumstances, lead to an unreasonable result.

One of our correspondents thought there was no need for reform:

> As to the rules of construction, I am puzzled by the fact that the Paper draws upon all such rules indiscriminately for its attack upon them. Rules concerned with presumption of meaning are cheek-by-jowl with rules concerned with public policy, and no distinction of role or development is drawn. To me it seems inevitable that, as we move from the testators and judges of mid-nineteenth century England, so many the products of a classical education, and an Austinian tradition, to today's scene, there is bound to be a constant pattern of change in the concept of, and the approach to, the art of conveying meaning. I find this neither surprising nor disturbing. The courts today realise the change, and in my view they have shown that they fully see the need and the opportunity to allow out-dated presumptions to fade into the past. After all a rule of construction always gives way to evidence so found of contrary intent, and no judgment binds later courts.

Our proposal was designed, in part, to codify the present (or developing) attitude towards the use of rules of construction observed by our correspondent. Another correspondent wrote:

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[59] *Le Cras* v. *Perpetual Trustee Co.*, [1967] 3 All E.R. 915, 926 (H.L.), *per* Lord Wilberforce.

[60] *Inderwick* v. *Tatchell*, [1903] A.C. 120, 122 (H.L.).

> I agree in principle with this recommendation. Indeed, as the Working Paper notes, there is already support for it in the cases: see also, in addition to the dictum cited on page 55, Lord Romer in *Perrin* v. *Morgan* [1943] A.C. 399, 421 (H.L.). Nonetheless it is probably wise to have some legislative provision to this effect.

Two repeated criticisms of this proposal were made:

1. Some attempt should te made to consider rules of construction on a rule-by-rule basis.
2. Rules of construction which reflect policy decisions should be addressed directly.

With respect to the first point, the Commission's position in the Working Paper was that we were merely restating the current law. With respect to the second point, the rules unanimously identified for special consideration were those respecting common law spouses and illegitimate children. We have addressed those rules in our Working Paper on Statutory Succession Rights.

Another concern with the proposal was that the test of reasonableness could not be applied, since the only criterion of reasonableness should be the testator's intent, and that, by definition, is not discoverable if the courts are tempted to apply a rule of construction. One of our correspondents wrote:

> . . . we feel that the language used results in reasoning that is somewhat circuitous. The final phrase referring to the rules of construction, "but should decline to apply them if they would, in all the circumstances, lead to an unreasonable result" should be deleted. If a court of law is unable to elicit the testator's true intent, then it is not in a position to determine whether application of such rules would lead to an unreasonable result. If the testator's dispositive intent cannot be ascertained, then regard should be had to the rules of construction.

Another observed:

> The proposals deny a Court any assistance from the rules if the result would be unreasonable. Since the Court can only look to the rules in the first place if it cannot elicit intent, it appears that intent cannot be considered in determining what is reasonable. This is undesirable.

Our correspondents appeared to be concerned that the proposal contemplated measuring the reasonableness of a bequest by some subjective standard. It was thought that might encourage judges to remake wills in which no problems of interpretation arose, but which made directions that, to the judge, appeared to be unreasonable. That was not the Commission's position. An example posed by one of our correspondents demonstrates how the proposal should function.

> We should also consider the situation where we can tell that the testator intended either result A or result B, but we can not tell which, and the rules of construction would direct result X. Perhaps, by objective standards, result X is not unreasonable. It only becomes unresonable when we know that the testator did not intend it.
>
> We think it might be desirable if your recommendation No. 2 was broken down to cover these different cases and to be specific about whether the unreasonableness of the result is to be measured against the testator's intent or the court's objective standard (if it can be called that).

The proposal was designed to cope with the following problem: if the testator, in the circumstances, could only have intended result A or B, but the rule of construction directs result X, the rule should not be applied. For example, the testator leaves Z all "her money". That is the only gift he makes. Evidence reveals that the testator's estate consisted of money he was owed and bonds. The testator had very little cash. It would appear that by "money" the testator meant the money he was owed, or the bonds, or both. "Money," however, has the primary meaning of cash. That meaning should be rejected,

because it is unreasonable in the circumstances. The test of reasonableness with respect to the circumstances, was to let courts give effect to the gift as the testator must have intended, even though there is no evidence other than circumstantial evidence respecting that intent.

In the past few years the courts have been more consistent in using the rules as guides to the meaning testators attach to their wills, and not as objective standards to replace that inquiry, and there is every reason to suspect that, upon the enactment of recommendation 2, the courts' emerging use of the rules of construction for guidance only will continue. Nevertheless there appears to be considerable latitude for courts to apply a rule of construction without reference to the meaning the testator may have intended his will to have. Upon further consideration, the Commission remains convinced that it is desirable for legislation to provide that the rules of construction should not be used by the courts to arrive at an interpretation inconsistent with that intended by the testator.

The Commission recommends that:

3. Legislation should be enacted to confirm that a result flowing from an application of a rule of construction to words used in a will should not be preferred to a result flowing from the meaning the testator, when executing his will, attached to those words.

G. Statutory Rules of Construction

The *Wills Act* contains rules of construction in sections 16, 20 (2), 21, 22, 23 (1), 23 (2), 24, 25, 26, 29 (1), 29 (2), 30, 31 and 32 of the *Wills Act*. The text of these sections is set out in Appendix A to this Report.

These sections were enacted to replace common law and equitable rules which quite clearly operated to defeat the intentions of most testators. Many of these statutory rules are borrowed directly from the English *Wills Act, 1837*. These include the rule that a will speaks from the testator's death,[61] the rule that lapsed or void devises and bequests are included in a residuary devise or bequest[62] and the rule that leaseholds are included in general devises.[63]

All of these statutory rules of construction are subject to a contrary intention which appears by the will. Thus, extrinsic evidence of a testator's contrary intention would not alter the effect of a statutory rule. The proviso that the contrary intention must appear by the will originated in the *Wills Act, 1837*, at a time when extrinsic evidence was strictly curtailed, and was designed to reflect the law at that time. By the end of the nineteenth century the harshness of the proviso that the contrary intention must appear by the will was being diminished. Although the contrary intention had to be found in the will,[64] it need not have been express:[65]

> . . . it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt; but it is to be gathered by adopting, in reference to the expression used by the testator, the ordinary rules of construction applicable to wills.

In the Working Paper we concluded that the proposals we made with regard to admissibility of extrinsic evidence and the effect of the rules of construction, should apply with equal force to these statutory rules of construction. We proposed that:

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[61] *Wills Act*, R.S.B.C., c. 434, s. 20(2).
[62] *Ibid.* s. 21.
[63] *Ibid.* s. 22.
[64] *Boyes* v. *Cook*, (1880) 14 Ch. D. 53, 57.
[65] Halsbury's *Statutes of England*, Vol. XX, (1930), at 445.

3 (a) The *Wills Act* be amended to provide that in sections 20 (2), 21, 22, 23 (1), 23 (2), 24, 25, 26, 29 (1), 29 (2), 30, 31 and 32 contrary intent may be expressed or appear in or by the will, or be established by relevant direct or indirect evidence including evidence of the testator's dispositive intent.

(b) The *Wills Act* be amended to provide that if the court is unable to elicit the testator's intent from his will or from relevant direct or indirect evidence, including evidence of the testator's dispositive intent, the court may have regard to sections 20 (2), 21, 22, 23 (1), 23 (2), 24, 25, 26, 29 (1), 29 (2), 30, 31 and 32 but should decline to apply them if they would, in all the circumstances, lead to an unreasonable result.

Some of our correspondents argued that many of these statutory rules are legislative statements of policy, and should not be placed on the same footing as common law and equitable rules of construction:

> My difficulty with 3 (b) is that it suggests a uniform treatment for sections which may require separate treatment. I am not sure, for example, that all of the sections referred to can be considered as replacing rules that quite clearly operated to defeat intent. But even if that can be the case, I think it may be wise to give separate consideration to each of the sections. Some, for example section 30, may relate to both intent and social policy. Section 32, as a guess about intention and as a reflection of what is fair, is arguably still worth retaining as an indication of prima facie intent. On the other hand I have always had my doubts about how far section 29 operates for the benefit of the children of a deceased brother or sister. In sum, therefore, I would suggest that it would be wise for the Commission to analyze each of these sections separately before subjecting them to a blanket provision.

Some of our correspondents argued that these rules should be considered separately to determine whether the policy supporting those rules is still appropriate.

At the time we published the Working Paper we contemplated making such an examination of many of these rules in a subsequent project tentatively entitled "The Effect of Testamentary Instruments." We are persuaded that these rules should not be placed on the same level as common law and equitable rules of construction, and intend to examine the statutory rules on a rule by rule basis. We still believe, however, that if a contrary intention can be established by extrinsic evidence, then that should be sufficient to displace a statutory rule.

Re Hicknell,[66] a recent decision of the Ontario High Court, is a case in point. The testator devised his house and its contents to his common law spouse. The house was subject to two mortgages. The other assets of the testator's estate included a life insurance policy. A year before his death, the testator had the policy changed so that payment of its proceeds would be made monthly for 25 years following his death. Extrinsic evidence indicated that the deceased intended the insurance policy to provide for the mortgage payments.

Section 32 of the Ontario *Succession Law Reform Act*,[67] which is similar to section 31 of the British Columbia *Wills Act*, provides that real property subject to encumbrances, remains subject to those encumbrances unless a contrary intention is signified by will, deed or other document. No express contrary intention was contained in any documents, and, consequently, the insurance proceeds could not be used to make the mortgage payments. They devolved to other beneficiaries. We have concluded that if contrary intention can be discovered from extrinsic circumstances, that should be sufficient to rebut a statutory rule of construction.

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[66] (1982) 10 E.T.R. 288 (Ont. H.C.).
[67] R.S.O. 1980, c. 488.

The Commission recommends that:

4. Sections 20 (2), 21, 22, 23 (1), 23 (2), 24, 25, 26, 29 (1), 29 (2), 30, 31 and 32 of the Wills Act be amended to provide that contrary intention may be established by the will or by other relevant evidence.

Section 16 of the *Wills Act* concerns the right of a separated or divorced spouse to take under the will of the deceased spouse. It too is subject to a contrary intention contained in a will. The section is less concerned with giving effect to the testator's intent than harmonizing the provisions of the *Family Relations Act* with succession law, by providing that a divorced or separated spouse may not take under the will of the deceased spouse. There will be many cases where the deceased intended to benefit his former spouse by will. For example, it is not uncommon for the spouses to include in a separation agreement that the will of one spouse will continue to benefit the other. This is certainly a contrary intention, but it is not contained in the will, and nothwithstanding the agreement between the spouses, the gift to the surviving spouse will be revoked. In our Working Paper entitled "Statutory Succession Rights," we have considered the interrelation of succession law with spousal rights, and our proposals with respect to section 16 are contained in that Working Paper.

CHAPTER IV

RECTIFICATION

A. Conflict Between the Testator's Intent and the Words Used in the Will

As we have observed, if the words used by the testator do not accurately reflect his intended meaning, various problems of construction may arise. Our recommendation to make a broad range of evidence admissible on an application for construction should significantly ease a judge's task in discovering and giving effect to the testator's intent. However, when attempting to give effect to the testator's intent, judges are faced with a further problem. Because courts are required to give effect to the words used by the testator, they possess very limited powers to give effect to the intent of the testator when the words he has used convey a meaning opposed to that intent.[1] This problem may arise when the testator has misdescribed the subject of the gift or its donee, or when he fails to provide for a contingency which occurs. Often the problem arises when the testator, or his draftsman, makes a mistake, and the words used in the will are not those which he intended to use.

B. Powers of the Court to Rectify a Will

Words may be included in, or omitted from, a will in error. When this occurs in other legal instruments such as deeds or contracts, the document may be rectified so that it embodies the actual provisions intended by the parties to it.[2] Courts have no power to rectify a will, except in a very limited sense. As a general rule, the court must take the will as it finds it.

When exercising its jurisdiction to determine the validity of a will, a Court of Probate may delete from a will words mistakenly included,[3] unless the mistake has been approved by the testator.[4] The Court of Probate may not, however, add or vary words in order to rectify a mistake.

In the absence of fraud,[5] a Court of Construction has no power to rectify a will. It does, however, possess two powers which resemble rectification. A Court of Construction may reject an inessential, inaccurate part of a description (the principle of *falsa demonstratio*).[6] It may also supply,[7] vary,[8] transpose[9] or reject[10] words in order to give effect to the testator's expressed intention, provided the correct words can be determined from reading the will.[11] This is known as correcting errors and omissions in a will by implication.

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[1] *See, e.g., Re Zurowski*, [1927] 3 W.W.R. 745 (Sask. K.B.); *Perrin* v. *Morgan*, [1943] A.C. 399 (H.L.); *Re Snyder*, [1960] O.R. 107 (H.C.); *Re Millichamp*, [1948] O.W.N. 593 (H.C.); and compare *Re Harmer*, [1963] 2 O.R. 690, 40 D.L.R. (2d) 825 (H.C.) with *Maclean* v. *Henning*, (1903) 33 S.C.R. 305; *Re Horinek*, (1980) 6 E.T.R. 21 with *Re Jebb*, [1966] Ch. 666 and with *Re Hogbin*, [1950] 2 W.W.R. 264, [1950] 3 D.L.R. 843 (B.C.S.C.); *Re Snyder*, [1960] O.R. 107 (H.C.) and *Re Woods*, [1931] 2 Ch. 138 with *Re Brush*, [1942] O.R. 647 (H.C.).

[2] *Re Colebrook's Conveyances*, [1973] 1 All E.R. 132.

[3] *Harter* v. *Harter*, (1873) L.R. 3 P. & D. 11; *Rhodes* v. *Rhodes*, (1882) 7 App. Cas. 192 (H.L.).

[4] *Harter* v. *Harter*, (1873) L.R. 3 P. & D. 11; *Re Zurowski*, *supra*, n. 1; *Re Veres; Pirot* v. *Veres*, [1942] 3 D.L.R. 770 (Sask. K.B.); *Guardhouse* v. *Blackburn*, (1886) 1 P. & D. 109.

[5] *Re Bacharach's Will Trusts*, [1958] 3 All E.R. 618.

[6] *Re Fish*, [1894] 2 Ch. 83 (C.A.); *Re Ofner*, [1909] 1 Ch. 60 (C.A.).

[7] *Re Cooper*, (1913) 14 D.L.R. 172 (Ont. S.C.-A.D.); *Colvin* v. *Colvin*, (1892) 22 O.R. 142; *Re Hamilton*, (1908) 12 O.W.N. 1177; *Re Parnell*, [1924] 1 W.W.R. 1, 1 D.L.R. 15 (Man. C.A.); *Re Le Blanc*, (1955) 16 W.W.R. 389 (Man. Q.B.); *Re Galt*, (1957) 12 D.L.R. (2d) 140 (B.C.C.A.); *Central and Nova Scotia Trust Company* v. *Freeman*, (1975) 58 D.L.R. (3d) 541 (N.S.S.C.-T.D.); *Re Smith*, [1947] 2 All E.R. 708; *Re Whitrick*, [1957] 2 All E.R. 467 (C.A.).

[8] *Re Zurowski*, *supra*, n. 1; *Re Millichamp*, *supra*, n. 1; *Re Veres*, *supra*, n. 4; *Re Northen's Estate*, (1884) 28 Ch. D. 153; *Re Davrell*, [1904] 2 Ch. 496.

[9] *Supra*, n. 5.

[10] *Smith* v. *Crabtree*, (1877) 6 Ch. D. 591; *Re Wyllie*, [1920] 3 W.W.R. 392 (Alta. S.C.).

[11] *Re Bacharach's Will Trusts*, *supra*, n. 5; *Re Lennox*, (1920) 18 O.W.N. 268; *Douet* v. *Budd*, [1978] 2 W.W.R. 345 (B.C.C.A.); *Re Smeltzer*, (1976) 72 D.L.R. (3d) 280 (Alta. S.C.-T.D.); *Marchuk* v. *Marchuk*, (1965) 52 W.W.R. 652 (Sask. Q.B.); *cf., Re Holosko's Will*, (1968) 63 W.W.R. 125 (Alta. S.C.).

C. Why Doesn't the Court of Construction Possess a Power to Rectify?

Two reasons are usually given to justify the lack of a jurisdiction to rectify wills. The first is that a power to rectify would subvert the formalities required by the *Wills Act* to make a will.[12] The power of the Court of Probate to delete words included by mistake does not violate the spirit of the *Wills Act*. The formalities are designed to ensure that the will, in the form intended by the testator, is admitted to probate. It follows that anything included by mistake was not intended to form part of the will and, therefore, may be deleted.

The Court of Construction has no power to delete words included by mistake because it must accept the decision of the Court of Probate upon the validity of the will.[13] Any power to add words, it is argued, would amount to remaking the testator's will and violate the spirit of the *Wills Act* and the need for formalities.[14] However, other legal instruments which must be formally executed may be rectified.[15] In Chapter II we discussed the need for formalities of execution, and concluded that they should not stand in the way of discovering and giving effect to the deceased's actual testamentary intentions. Neither should they prevent rectification. We can add nothing useful here to our earlier discussion.

The second reason often given against a power to rectify is that there is no reliable guide to what the testator intended to say. In *Re Harris*,[16] Middleton, J.A. rejected an application for rectification saying:[17]

> I cannot supply the words intended to be used by the testator, as I don't know what he intended . . . His intention has perished with him . . .

At a time when the courts were reluctant to consider extrinsic aids to discover the meaning the testator attached to his will, perhaps this statement was supportable. However, the growing tendency of the courts to place themselves in the testator's armchair and to consider the surrounding circumstances in order to discover the testator's intention renders this argument less forceful. Quite often the testator's intention has not perished with him, but can be gathered from the whole of the will, by reference to extrinsic circumstances, or from evidence of his intent.

Our earlier recommendations are intended to enhance the courts' ability to discover the meaning the testator intended the words in his will to bear. If the courts are faced with words included by mistake then, in the absence of a power to alter the testator's will, the courts must decline to give effect to the testator's wishes.

There are many examples of the absurd lengths to which the courts must go, lacking a true power to rectify, to give effect to some semblance of the testator's intention. In *Re Morris*[18] the testatrix amended her will by codicil. Her intention had been to revoke a gift contained in clause 7 (iv) of her will, but in error she revoked all of the gifts contained in clause 7. The Court of Probate could not rectify the will. Instead it deleted the numeral "7" on the ground that it was surplusage, thus saving all of the gifts, including the one the testator intended to revoke.

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[12] *Earl of Newburgh* v. *Countess Dowager of Newburgh*, (1820) 5 Madd. 364, 56 E.R. 934.
[13] *Theobald on Wills*, (13th ed., 1971) at 157.
[14] *Ibid.*, and *see supra*, Chapter II.
[15] *Supra*, n. 2.
[16] [1942] O.W.N. 429 (H.C.).
[17] *Ibid.* at 430.
[18] [1971] P. 62.

In *Re Reynette-James, dec'd.*[19] the draftsman, revising a will as directed by the testatrix, mistakenly deleted a gift to the son of the testatrix of capital in the residue of a life estate. As a result, the will directed that the gift would go to other beneficiaries who were only intended to take in the event the son died before the life estate terminated. The Court of Probate, unable to add the gift to the son, deleted the gift over, so that the residue of the estate would pass to the son absolutely on an intestacy.

In other cases the courts are unable to even approximate the testator's intent. In *Harter* v. *Harter,*[20] the testator's solicitor prepared a will containing a residuary clause which referred only to the disposition of real estate. The court refused to admit the solicitor's evidence that the testator had instructed him to prepare a gift of all of the residue of the estate. There was an intestacy as to the residuary personal estate. Similarly, in the non-probate case of *Marchuk* v. *Marchuk,*[21] the testator directed a notary public to include in his will a gift of his real estate and effects to be divided among his twelve children. The notary public mistakenly confined the gift to personal estate. The Court of Construction refused to hear the evidence of the notary public, and the bulk of the testator's estate, which consisted of real property, passed under a general residuary gift.

It is clear that restricting the jurisdiction of a court to rectify a will may mean that in some cases effect will not be given to the testator's wishes, and that this can lead to injustice. This is particularly so when the error is the result of a mistake committed by a professional adviser. The results achieved by the current law suggest that judges might usefully be given the power, in appropriate cases, to rectify the provisions of a will.

D. Correcting Errors and Omissions in a Will by Implication

1. Generally

We mentioned earlier that the Court of Construction possesses a limited power to correct errors or omissions in a will by implication. This power has been defined as follows:[22]

> The rule as so expressed has two limbs. The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in his will. Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it.

If an error or mistake is discoverable only by considering extrinsic evidence, then the courts are powerless to correct it.[23] In *Re Follet,*[24] the testator gave A a general power of appointment. It was apparent upon the face of the will that mistakes had been made in drafting the general power of appointment. Roxborough, J., compared the provision with a common precedent from which it appeared to have been taken, and supplied the missing words. On appeal the decision was reversed. The omitted words could not be supplied because they could not be determined from reading the will alone.

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[19] [1976] 1 W.L.R. 161.
[20] *Supra*, n. 4.
[21] *Supra*, n. 11.
[22] *Re Follett*, [1955] 1 W.L.R. 429, 437 (Eng. C.A.), *per* Romer L.J.
[23] *Supra*, n. 11.
[24] *Supra*, n. 22.

2. Why the Power is Limited

The reasons which militate against a power to rectify apply equally against a power to correct a will by implying words. The jurisdiction to imply words to perfect a gift follows from the rule of construction that the court is to gather the intention of the testator from the words he has used. To go further and imply words to give effect to testamentary intent gathered from a consideration of extrinsic aids would be a departure from objective interpretation.[25] Consequently, the power is limited and reluctantly used. A rather startling example of this reluctance is the case of *Ralph* v. *Carrick*, decided in 1879.[26] The testator made a gift to his heir-at-law and others to take effect upon the death of his wife, but neglected to provide for his wife. The court refused to imply a life estate in the wife. Brett, L.J. said:[27]

> It sometimes amuses me when we are asked to say what was the actual intention of a foolish, thoughtless, and inaccurate testator. That is not what the Court has to determine: all the Court can do is to construe, according to settled rules, the terms of a will, just as it construes the terms of any other written document. This is obviously the will of a foolish, thoughtless, and inaccurate man. If he really intended his wife to have an estate for her life, what was more easy than for him to say so?

The judicial attitude reflected in *Ralph* v. *Carrick* is representative of that which prevailed during the high water mark of objective interpretation. Judges today are considerably more sensitive to the problems which can arise from the interpretation of wills.

3. The Principle in Practice

A review of the cases reveals that it is extremely difficult to predict when a court will exercise its power to correct errors and omissions by implication. A recurring problem is the testator who makes provisions for his wife surviving him or dying simultaneously, but fails to make any direction should his wife predecease him. In *McLean* v. *Henning*,[28] the Supreme Court of Canada declined to imply a gift to the beneficiary who would have taken had the deaths of the testator and of his wife coincided. The case of *Re Craig*,[29] is to similar effect. McKinnon, J.A., said:[30]

> A Court should only tamper with and add to the words of a will, particularly one drafted by a solicitor, where it is perfectly clear that the testator has not accurately, or completely expressed his intention. In other words, a case which is almost beyond argument.

However, in *Re Smith*,[31] *Re Whitrick*,[32] *Re Harmer*,[33] and *Hawkinson* v. *Hawkinson*,[34] the courts were prepared to imply such a gift. In *Re Whitrick* the court was moved by the following argument:[35]

> I cannot believe that the testatrix and her husband, in his turn, were both of them so playful, cynical or eccentric that they decided . . . to leave part of their estate to their relatives or friends only in the most highly improbable event of their both dying at the same time.

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[25] *Re Cochrane's Settlement Trusts*, [1955] 1 All E.R. 222 (Ch.).
[26] (1879) 11 Ch. Div. 873 (C.A.).
[27] *Ibid.* at 876.
[28] *Supra*, n. 1.
[29] (1978) 2 E.T.R. 257 (Ont. C.A.).
[30] *Ibid.* at 261.
[31] [1948] 1 Ch. 49.
[32] [1957] 2 All E.R. 467 (C.A.).
[33] [1964] 1 O.R. 367 (C.A.); *see also Central and N.S. Trust Co.* v. *Freeman*, *supra*, n. 7.
[34] (1977) 4 B.C.L.R. 285, 1 E.T.R. 245, 80 D.L.R. (3d) 390 (B.C.S.C.).
[35] *Supra*, n. 32.

This problem of interpretation arose in a recent British Columbia case, *Re Hansen*.[36] The testatrix provided for certain dispositions of her estate if her death and her husband's were "similtaneous" (sic). Because the testatrix had misspelled "simultaneous," the court held that it was a word not capable of definition and deleted it from the will as *falsa demonstratio*. That is an example of the courts using principles of objective construction to come to an interpretation that probably corresponded with the meaning the testatrix intended her will to have. The court then went on to hold that even if "similtaneous" meant "at the same time," the testatrix's intention was to provide for the disposition of her estate if her husband was unable to enjoy it, notwithstanding that her husband's death occurred some time before hers. That is an example of the courts using liberal principles of interpretation, so that the strict meaning of the words used does not stand in the way of the interpretation the testatrix intended them to have.

Another recurring problem is the testator who provides for a gift over if A dies without issue, but neglects to direct what is to occur if A dies leaving issue. In *Scale* v. *Rawlins*,[37] *Greene* v. *Ward*,[38] *Addison* v. *Busk*[39] and *Sparks* v. *Restal*,[40] the court refused to imply a gift to issue. In *Greene* v. *Ward* it was said:[41]

> Neither can we, from these words, imply a gift to the issue of George Greene. If a sum of money is bequeathed to A.B. for life, and, if he dies leaving no issue, then to another, that does not raise any implication in favour of the issue of A.B., though, if he dies leaving issue, the gift over does not take effect.

As a result, neither the remainderman nor the issue of the life tenant will take, and the courts choose the least probable alternative as the intention of the testator. The gift lapses.

In contrast to these decisions can be placed other more recent cases where, upon similar facts, the courts were prepared to imply a gift to issue, such as *Re Coppley*,[42] *Re Brown*[43] and *Re MacDonald*.[44]

4. When Words May be Implied

The power to imply words or gifts was at one time exercised only when the courts were convinced that a rule of construction had developed. In *Ralph* v. *Carrick*, mentioned earlier, it was said:[45]

> Is there any rule established by the authorities as applicable to a gift to the heir-at-law and another person jointly after the death of A. I am of opinion that none of the cases establish any rule of construction applicable to such a case. Although cases have been cited in which, in a gift to an heir-at-law and others after the death of A, a life estate to A has been implied, none of the judges have laid down that there is a general rule of construction which, unaided by anything else in the will, will raise the implication from a devise in these terms.

In a recent case, *Re Dinn*,[46] the court was called upon to construe a gift to "grandnephews and nieces." Rather than inquire whether the testator meant

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[36] (Unreported B.C.S.C. decision) [1982] B.C.D. Civ. 4209-04, *per* McMorran, L.J.S.C.).
[37] [1892] A.C. 342.
[38] (1826) 1 Russ. 262, 38 E.R. 102.
[39] 14 Beav. 459, 51 E.R. 363.
[40] (1857) 24 Beav. 218, 53 E.R. 341.
[41] *Supra*, n. 38 at 265.
[42] [1940] 3 D.L.R. 535, (Ont. S.C.).
[43] [1962] O.R. 237, 32 D.L.R. (2d) 477 (H.C.).
[44] (1956) 5 D.L.R. (2d) 175, 19 W.W.R. 468 (Alta S.C. App. Div.).
[45] *Supra*, n. 26.
[46] (1978) 2 E.T.R. 100 (N.S.S.C.-T.D.).

"grandnephews and grandnieces," the court relied upon an American rule of construction that:[47]

> . . . a devise or bequest to 'grandnieces or nephews' will be construed as the intention of the testator to have the word 'grand' modify both the words 'nieces and nephews' so as to include both grandnieces and grandnephews.

The English rule of construction would have dictated that the gift go to nieces and grandnephews only.[48]

The power to imply words, however, is generally regarded as a more flexible aid to interpretation than are the rules of construction. The nature of the power was more accurately described by Harman, J., in *Re Birkin*:[49]

> . . . I conceive that, as a matter of construction, I am entitled to read the words rather as they should be than as they are, not in order to make a new will for the testator, but to make his will as I think he intended it, although for some reason some words have dropped out.

When the power may be exercised is open to some doubt. The standard of conviction necessary to imply a gift has been expressed in a number of ways. It has been said that[50]

> To read into this will the words necessary to provide for the unmentioned event the Court must be compelled to the conclusion that the will reveals so strong a probability of such an intention that a contrary intention cannot be supposed.

Exercise of the power has been described as justified only "as a matter of necessity,"[51] although it has also been said:[52]

> There is hardly any case where an implication is of necessity, but it is called 'necessary,' because the courts find it so to answer the 'intention of the devisor.'

It has been referred to as an "irresistible inference"[53] in some cases and, in others, only as a "reasonable inference."[54] At times the courts require reasons for the occurrence of the error or omission[55] and, at other times, they expressly refuse to consider why it has occurred.[56]

5. Implying Words in the Light of Extrinsic Evidence

The strict rule is that words may only be implied to correct a will, if they can be determined from the face of the will alone. Nevertheless there are cases where the courts have gone further than the strict rule and corrected wills based upon a consideration of extrinsic evidence.

For example, the courts were unwilling to correct the legal description of misdescribed property in a testamentary gift in *Re Cargill*[57] and in *Re Clement*.[58] In *Re Cargill*, Goodman, J., said:[59]

> I may say that if I were not faced with the earlier decisions of Judges of this court and bound by the decisions of Courts of superior jurisdiction, which I have cited above, I would have been inclined to have considered not only the contents of the will, but also all of the extrinsic evidence indicating surrounding circumstances in order to ascertain the intention of the testator. In my view, the extrinsic evidence supports the conclusion that the testator intended that Parcel 1 be devised to his

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47 95 *Corp. Jur. Sec.*, para. 664.
48 *Re Dale*, [1931] 1 Ch. 357.
49 [1949] 1 All E.R. 1043, 1047 (Ch.).
50 *Re Harmer*, [1964] 1 O.R. 367 (C.A.), *per* Aylesworth, J.A. (dissenting) at 369.
51 *Re Smith*, *supra*, n. 31, at 52, *per* Vaisey J.
52 *Wilkinson* v. *Adam*, (1812-3) 1 V. & B. 422, 35 E.R. 163.
53 *Re Brown*, [1962] O.R. 237, 32 D.L.R. (2d) 477 (H.C.).
54 *Re Macdonald*, (1956) 5 D.L.R. (2d) 175, 180 19 W.W.R. 468 (Alta. S.C., App. Div.) *per* Clinton, J., Ford, J.A.
55 *Re Harmer*, *supra*, n. 33. (C.A.).
56 *Re Smith*, *supra*, n. 31.
57 (1977) 1 E.T.R. 24 (Ont. H.C.).
58 (1910) 22 O.L.R. 121.
59 *Supra*, n. 57 at 36.

> brother . . . Addy J., in *Re Butchers* has commented upon the dangers of considering extrinsic evidence, a danger which our Courts have recognized for many years. It is only in exceptional circumstances that such evidence may be considered and, even though the failure to do so may, in some cases, lead to a result which does not accord with the apparent intention of the testator as disclosed by the extrinsic evidence, the rule cannot be relaxed for that only.

But in *Re Shaver*,[60] *Hickey* v. *Hickey*,[61] *Re Harkin*[62] and *Re McPhee*,[63] the description was corrected by implication. These errors could only be detected, and corrected, by referring to extrinsic evidence.

Hawkinson v. *Hawkinson*, a British Columbia decision, concerned a will which failed to provide for the event which occurred. Macdonald, L.J.S.C. implied the necessary words, saying:[64]

> On a careful examination of both wills, and the material filed by the petitioner, it appears to be patent that the testator intended to make an absolute gift of his entire estate to the petitioner. The paragraph corresponding to paragraph 3 in the petitioner's will was not inserted in the will and was not noticed by the solicitor, his stenographer or by the testator.

Macdonald, L.J.S.C., therefore, implied a gift based upon a consideration of extrinsic evidence. Similarly, one can point to the many cases where a husband and wife have prepared mutual wills, and accidentally signed the will of the other.[65] The courts have corrected these errors, again something which could only be done by considering extrinsic evidence.

In *Olson* v. *Wasyliwna*,[66] the testator left his residuary estate to "my four sisters" or the survivor of them. He was survived by two sisters, a step-sister, and the daughters of a deceased sister. Strict construction would dictate that the gift be shared by the two surviving sisters, or, perhaps, the two sisters and the step-sister. The court heard evidence from the notary who prepared the will, and compared the provisions of a previous will, and concluded that the testator intended to benefit his five female relatives. In *Re McDermot and Owens*,[67] a Manitoba case, however, the testator's will referred to equal division of the residue of his estate among named persons, but the amounts bequeathed were unequal. The court refused to refer to earlier drafts of the will, in order to determine whether a mistake had occurred, although the conflict between directions indicated some sort of error had been made. The court held that the specific distribution provisions overrode the general reference to equal division.

In those cases where the courts have ignored the restrictions on their powers to correct wills, they have achieved just results. Unless the law in this context is clarified, inconsistent results will continue to occur.

E. Reform

The jurisdiction to correct a testator's will may be narrowly or broadly defined. It may consist of rectification in a literal sense: the power to correct a mistake made by the testator or draftsman, involving the deletion of words included, or the addition of words left out, in error. Or it may be of a broader nature, allowing the courts to vary words to accord with the testator's intent

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[60] (1884) 6 O.R. 312.
[61] (1891) 20 O.R. 371.
[62] (1906) 7 O.W.R. 840.
[63] [1948] 1 W.W.R. 65 (Alta.).
[64] (1977) 4 B.C.L.R. 285, 1 E.T.R. 245, 80 D.L.R. (3d) 390 (S.C.).
[65] *Re Bramley*, (1952) 6 W.W.R. (N.S.) 702 (B.C.); *Re Bobachewski*, (1967) 60 W.W.R. 635 (Sask.); *Re Knott*, (1959) 27 W.W.R. 382 (Alta.); *Re Thorleifson*, (1954) 13 W.W.R. (N.S.) 575 (Man.).
[66] (Unreported B.C.S.C. decision) [1982] B.C.D. Civ. 4209-05, *per* Anderson, L.J.S.C.).
[67] (Unreported Man. Co. Ct. decision) Mar. 19, 1981, *per* Krindle, Co. Ct. J.).

discoverable by reference to extrinsic evidence even though it cannot be said that there was an actual mistake.

1. Traditional Doctrine of Rectification

The English Law Reform Committee has recommended[68] that a court should enjoy a power to rectify which, on compelling evidence, would allow it to add, delete or vary words so that the will to be construed is first placed in the form intended by the testator. This jurisdiction would extend only to correcting clerical error, or mistakes in drafting resulting from misunderstood instructions. The courts would still be powerless to correct errors arising from failure to appreciate the effect of words, uncertainty or lack of intention.[69] The English Law Reform Committee said:[70]

> . . . we merely emphasise that the court should be able to give effect to the substance of the language intended by the testator. The dividing line between "language" and "meaning" may sometimes be hard to draw, but it has long been settled that the doctrine of rectification is confined to altering the language used by the instrument.

It was also recommended that there should be no restriction on the kinds of evidence admissible to support rectification. The real issue, they said, was the weight to be given to adduced evidence. This jurisdiction could be exercised notwithstanding that the testator had approved his will, but would be subject to a six-month limitation calculated from the testator's death.

Under the present law the court has no power to make any variation in a will if its contents have been approved by the testator.[71] Mere execution of a will may not constitute "approval" unless the testator has first read the will or had it read to him. The concept of "approval" is unsatisfactory. If it can be established that the testator or his draftsman has made a mistake, then the testator's "approval" is made by mistake as well, and should have no effect.

The provision for a six-month limitation on applications was recommended by the English Law Reform Committee in order to protect executors from liability for acting based upon the terms of a will that is subsequently rectified. They said:[72]

> In order to give reasonable security to executors and beneficiaries to exclude stale claims, we consider that it would be desirable to impose a time limit on applications for the rectification of a will admitted to probate . . . and we therefore recommend that the power of rectification that we propose should not be exercisable without the leave of the court unless an application is made not later than six months after the date on which representation is first granted.

The power to rectify recommended by the Law Reform Committee is framed in terms of the traditional doctrine of rectification as it applies to other documents. It is designed to place the will in the form intended by the testator, and then the words he has used or intended to use would be interpreted to determine what they mean. It cannot be denied that this power would resolve many specific problems which do arise from time to time. However, in the Working Paper we concluded that this power would not go far enough. It would not remedy those problems which arise where the words used were intended by the testator, but are clearly insufficient to support the meaning he attached to them; nor would it assist the court to give effect to a gift when the

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[68] Nineteenth Report (Interpretation of Wills), 1973.
[69] *Ibid.* at 10-11.
[70] *Ibid.* at 11.
[71] *Guardhouse* v. *Blackburn*, *supra*, n. 4.
[72] *Supra*, n. 68, at 12.

event which occurs is not provided for in the will. Essentially, rectification is designed to facilitate objective interpretation.[73]

The Law Reform Commission of Queensland considered whether to recommend a court power to rectify wills. They rejected the proposals of the English Law Reform Committee, saying:[74]

> Although we see much in favour of this recommendation we are hesitant to embark on what would be completely uncharted waters. In exercising the jurisdiction to rectify deeds the court often has the evidence of all parties to the deed before it; in rectifying a will it would never have the evidence of the testator himself. Further, there is a great deal to be said for the retention of the strict formal requirements for making of wills which have been accepted for over a hundred years in most English and many American jurisdictions and which are fairly well understood and often acted upon by laymen. If a generous invitation were to be extended to would-be rectifiers of wills, it might be interpreted as a serious inroad on what is recognised to be an effective and justifiable requirement for the protection of testators. It is in any case undesirable to offer much scope for litigation in an area where family passions regrettably all too often override reasonable expectations.

They also argued that many of the injustices which result from the absence of a power to rectify would be remedied by dependant's relief legislation similar to the British Columbia *Wills Variation Act* to provide maintenance to the testator's family.

The Queensland Commission recommended that the Court of Probate should be able to:[75]

> . . . exercise the same jurisdiction with respect to the insertion of material accidentally or inadvertently omitted from a will as it has at present to omit material which has been accidentally or inadvertently inserted in a will.

We are not persuaded that this proposal is satisfactory. The limited power proposed by the Queensland Law Reform Commission will remedy some but not all of the present failings of the law. In our opinion, it is not satisfactory to rely upon dependant's relief legislation to provide for beneficiaries the testator intended to benefit by will. As we noted earlier, the class of beneficiaries entitled to apply in British Columbia under the *Wills Variation Act*, is limited and, therefore, this route will not be available to every beneficiary who is prejudiced by the court's inability to give effect to the testator's discoverable intent. Moreover, dependant's relief legislation is not designed to give effect to the testator's intent. As we mentioned in Chapter II, the exercise of the court's discretion will often defeat the testator's intent.

2. Correcting a Will by Implication

In the Working Paper, we tentatively concluded that jurisdiction to correct a will should not be patterned after the traditional doctrine of rectification, which aims at placing the legal document in the form intended by its maker, and then construing that amended document. We observed that the Court of Construction enjoys a limited power to correct a will, in furtherance of its interpretation, if it is clear from the will what the testator meant, although his intentions were not recorded accurately. The Commission tentatively concluded that that jurisdiction, exercised in the light of evidence of extrinsic circumstances and of the testator's intentions, satisfactorily answered problems that might arise from mistakes in wills. We proposed that:

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[73] Fridman, *The Law of Contract*, (1976), 621.
[74] Q.L.R.C. Report No. 22, On the Law Relating to Succession, at 19.
[75] *Ibid.* at 20.

4. The *Wills Act* be amended to provide that the court shall give effect to the intent of the testator expressed in his will, but where the court, when interpreting a will, is satisfied that the intent of the testator is not expressed in the will, the court may vary, add or delete words in the will, notwithstanding that the will may have been read by or to the testator prior to execution.

There is a substantial distinction between the English Law Reform Committee recommendation to permit rectification of wills, and a broader power to correct wills by implying words in the light of extrinsic evidence. The English Law Reform Committee recommendation is designed to allow the Court of Probate to catch and correct mistakes arising from clerical error or misunderstood instructions, thus placing the will in the form intended by the testator. Only then would it be interpreted by the Court of Construction which would not be able to further rectify the will except for the limited power under the present law to supply words by implication.

A broader power to correct wills by implying words in the light of extrinsic evidence, on the other hand, would operate as an adjunct to the powers exercised by the Court of Construction. It would catch those problems arising from clerical error, as well as many other drafting defects which tend to frustrate the testator's intention. The court which must interpret and give effect to the will would exercise the power to correct it.

In the Working Paper we tentatively concluded that a power to correct a will by implication in the light of extrinsic evidence should generally be exercised by the Supreme Court of British Columbia when sitting as a Court of Construction. A Court of Probate might be called upon to interpret a will before it grants probate. One common example is when the Court of Probate must determine whether the will was made in contemplation of marriage. In those cases, we thought that the Court of Probate should possess a power to correct a will by implication. We were concerned, however, that this might lead to issue estoppel and prevent the court from subsequently interpreting a will at a time when all parties could be heard and the court could conduct a complete examination of the circumstances.

F. Comment

Many of our correspondents were concerned that the proposal would go too far, making the language of a will something of a side issue. While a need for a limited power to rectify was acknowledged, it was felt that a broad power, although desirable in some circumstances, in too many cases would permit the courts a flexibility undesirable in interpreting legal instruments. The occasional problems that arise where it would be desirable to have a broad power to correct a will by implication in the light of extrinsic evidence did not warrant granting courts unstructured and intuitive powers to interpret.

After publication of the Working Paper, the *Administration of Justice Bill, 1981*, referred to earlier, was introduced in the House of Lords in England.[76] In that Bill, action was taken on many of the recommendations of the English Law Reform Committee respecting Interpretation of Wills. Section 20 of that Bill dealt with rectification of wills:

> 20. (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions,
>
> it may order that the will shall be rectified so as to carry out his intentions.
>
> (2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the

[76] *The Administration of Justice Bill*, 1981.

date on which representation with respect to the estate of the deceased is first taken out.

(3) The provision of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.

(4) In considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

The approach taken in this Bill is to provide a power to rectify in circumstances where the solicitor's draftsman has mistakenly recorded the testator's instructions.

Athough we have been convinced that our original proposal was too broad, we think the English approach too narrow. If a power to rectify is to be tied to proof of a mistake, we still think the courts should have power to correct a mistake when the testator acts as his own draftsman. In all likelihood, more mistakes will occur in homemade wills than in professionally drafted wills. To that end, in addition to the two sources of error listed in section 20 (1) of the English legislation, we think an additional clause should be added: a failure by the testator to appreciate the effect of the words used. We have also concluded that a provision which permits the courts to rectify a will should also recognize that errors can arise when the testator's draftsman understands but fails to carry out the testator's instructions. A mistake by the draftsman will not necessarily be the result of clerical error. An additional clause to that effect should also be added. Moreover, rather than use the narrow term "clerical error" we think the clause "an error arising from an accidental slip or omission" should be used. This is patterned after Rule 42 (23) of the British Columbia Supreme Court Rules, the "slip rule," which empowers the courts to correct errors made in pleadings. This formulation is broader than a "clerical error" and avoids problems that may arise in establishing how an error arose. Moreover, there is useful case law on the ambit of Rule 42 (23) which will help the courts when using this power to rectify a will.

With respect to a time limit on applications, we remain convinced that a power to rectify is an adjunct to interpretation. Consequently, our tentative conclusion is that there is no need for a time limit on applications to rectify. The courts should be able to rectify a mistake made in a will whenever an application for interpretation may be brought. In any event, this is a question we intend to examine in a subsequent project on probate practice and procedure.

Neither will the deceased's personal representative, under this approach, be subjected to greater risk than under the current law. A court is unlikely to find a personal representative in breach for distributing pursuant to a will that is subsequently rectified. Nor should that prevent a beneficiary entitled to share in the estate from tracing assets into the hands of recipients who should not have been benefited. While it is our tentative conclusion that there is no need to address these matters in legislation, it is our intention to further examine these issues in a subsequent project on probate practice and procedure.

We have also concluded that both the Court of Probate and the Court of Construction should be able to exercise this jurisdiction to correct a will. As we mentioned earlier, in some instances a Court of Probate must interpret the will, for example, to determine whether it was made in contemplation of marriage. However, the Court of Probate should be reluctant to exercise this jurisdiction, particularly if all interested parties are not before it. There is a significant distinction between the functions of the Court of Probate and the Court of Construction. The Court of Probate, when determining whether a will is valid, must satisfy itself that it contains the language the testator intended to use. The Court of Construction's function is to determine what intention is expressed by those words. This distinction between the function of the Court of Probate and that of the Court of Construction will dictate when it is appropriate for one court or the other to hear an application for rectification. Although this approach may not be totally satisfactory, we think these questions can be safely left to the courts. As we mentioned, we intend to examine the divided jurisdiction of the Supreme Court of British Columbia in a subsequent project on probate procedure. For the time being, we can see no justification for further differentiation between the jurisdiction to be exercised by the court, depending on whether it sits as a Court of Probate or as a Court of Construction.

The Commission recommends that:

5. (a) Legislation should be enacted to provide that if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of

(i) an error arising from an accidental slip or omission;
(ii) a misunderstanding of the testator's instructions;
(iii) a failure to carry out the testator's instructions; or
(iv) a failure by the testator to appreciate the effect of the words used;

it may order that the will be rectified.

(b) For the purposes of rectification, the court may admit all relevant evidence including statements made by the testator or other evidence of his intent.

In Recommendation 5, the word "satisfied" is used to define the burden of proof which must be met before a court will rectify a will. The burden of proof which must be met, of course, is the usual civil standard, the balance of probabilities. Some members of the Commission were concerned that this was too low a standard to set. They felt that the courts should not rectify a will unless there is clear and compelling evidence demonstrating both that there is a mistake, and what must be done to correct it. It is the conclusion of the Commission, however, that it is undesirable to define new standards of proof to be met, which exist somewhere between the balance of probabilities and beyond a reasonable doubt. Since the weighing of evidence is not a precise science, defining new standards of proof would be unproductive. The kinds of evidence which will satisfy a court that a will should be rectified, will vary depending on the circumstances. To upset clear words, the evidence of mistake must necessarily be compelling. On the other hand, if language is obviously garbled, evidence sufficient to satisfy a court that the will should be rectified, need not necessarily be overwhelming. The courts approach rectification of other legal instruments cautiously. They should be no less cautious when considering an application to rectify a will.

CHAPTER V CONCLUSION

A. General

We have explored the origins and historical reasons for the rules which govern the interpretation of wills. Many of the historical reasons for circumscribing the powers of the court to interpret a will are no longer valid. Further, wills possess many features which make them unique and justify treating them differently from other legal instruments. For these reasons we have made recommendations to reform the rules which govern the interpretation of wills.

These recommendations are aimed at interpreting wills, which are legal instruments which take effect upon their maker's death. We have neither made recommendations nor fully discussed the rules which govern the interpretation of an instrument which takes effect during its maker's lifetime, but which must be interpreted after his death. In many cases such instruments may function almost identically to wills. For example, a person may make an *inter vivos* trust settlement such as "my house to A in trust, for the use of B during his lifetime, and then for the use of C." Trust settlements like this may raise problems of interpretation similar to those encountered in the construction of wills. Is there any reason for using different principles of construction to interpret two identical provisions merely because in one case it is contained in a document which takes effect during the lifetime of its maker, and in the other case it is contained in a will?

Inter vivos settlements differ from wills in one respect. An *inter vivos* settlement may be subject to court interpretation during the settlor's lifetime. Problems of evidence different from those encountered in the construction of wills arise. For example, the settlor may apply for rectification of the *inter vivos* settlement. However, while the settlor may give evidence concerning what effect the settlement was to have, his evidence will be carefully scrutinized:[1]

> If it is explicit enough and is uncontradicted, the evidence of a settlor may suffice for the rectification of a settlement, and even a mere perusal of the document itself may satisfy the court. Nevertheless, in the case of a voluntary settlement the court is especially cautious in granting rectification merely on the settlor's evidence if it is unsupported by other evidence such as his contemporaneous written instructions. This is so even if on rectification the settlement would more nearly accord with recognised precedents and the probable intention, and be more beneficial to the settlor.

It is arguable that the fact that the settlor of the trust settlement is still alive when the terms of the trust settlement are interpreted significantly distinguishes the problems which may arise when interpreting an *inter vivos* transaction from those encountered by a court when interpreting a will. At least to this extent there is some justification for employing principles of interpretation which differ depending on whether the courts are interpreting an *inter vivos* trust settlement or a will.

However, if the settlor is dead when it becomes necessary to interpret an *inter vivos* settlement, is there any factor which distinguishes the problems of interpretation which arise from those encountered in the construction of a will? We suspect that there is no appreciable difference between an *inter vivos* settlement, the ambiguous terms of which do not take effect until after the settlor's death, and a will. It is difficult, therefore, to justify employing different principles of construction to these two kinds of instruments.

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[1] Snell, *Equitable Remedies*, (27th ed., 1973) 616.

While we recognize that there are good reasons for extending our recommendations to legal instruments other than wills, at least to the extent that those legal instruments take effect after their makers' deaths, we are not certain whether problems are actually encountered by the courts in giving effect to these instruments. The fact that such instruments are capable of giving rise to problems of interpretation similar to those raised by wills does not mean that they actually do give rise to these problems. It may be, for example, that most *inter vivos* settlements are professionally drawn.

In the Working Paper we invited comment on whether it would be desirable to extend our proposals respecting interpretation of wills to other kinds of legal instruments. There was agreement that similar principles of interpretation should extend to all legal instruments. Nevertheless, the general conclusion was that, before extending recommendations for reform of the rules pertaining to the interpretation of wills to other legal instruments, it would be wise to wait and see how the courts handled the revised approach to interpretation. The Commission agrees with that position.

B. Summary of Recommendations

The Commission recommends that:

1. Legislation should be enacted to confirm that the courts' primary function when construing a will is to give effect to the testamentary directions contained in the will. (Page 24)

2. Legislation should be enacted to provide that relevant evidence, including statements made by the testator or other evidence of his intent, is admissible to determine the meaning the testator, when executing his will, attached to the words used therein. (Page 25)

3. Legislation should be enacted to confirm that a result flowing from an application of a rule of construction to words used in a will should not be preferred to a result flowing from the meaning the testator, when executing his will, attached to those words. (Page 36)

4. Sections 20 (2), 21, 22, 23 (1), 23 (2), 24, 25, 26, 29 (1), 29 (2), 30, 31 and 32 of the Wills Act be amended to provide that contrary intention may be established by the will or by other relevant evidence. (Page 38)

5. (a) Legislation should be enacted to provide that if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of

(i) an error arising from an accidental slip or omission;
(ii) a misunderstanding of the testator's instructions;
(iii) a failure to carry out the testator's instructions; or
(iv) a failure by the testator to appreciate the effect of the words used;

it may order that the will be rectified.

(b) For the purposes of rectification, the court may admit all relevant evidence including statements made by the testator or other evidence of his intent. (Page 50)

C. Acknowledgements

The volume and quality of response attracted by a Working Paper is often an unpredictable matter. Given a topic that many would regard as unglamourous, the Working Paper which preceded this Report drew a surprising number of cogent and helpful comments. A number of the individuals who

wrote to us also met with Commission representatives at meetings held both in Vancouver and Victoria. We wish to thank all those who took the time to consider the Working Paper and the issues which it raised and who wrote to us expressing their views or otherwise participated in the consultation process.

There are three individuals to whom we are particularly indebted. First is Mr. Jack Scott-Harston, Q.C., who acted as a consultant on this project and gave us the benefit of his many years of experience.

Second is Mr. Peter Fraser, a former member of the Law Reform Commission. Mr. Fraser participated in the development of the Working Paper and in the deliberations on our final recommendations. His term as a Commissioner expired only shortly before the contents of this Report were settled.

Finally, we wish to express our gratitude to Mr. Thomas G. Anderson, Assistant Counsel to the Commission. He bore the responsibility for the basic research in this area and, subject to direction from the Commission, drafted the Working Paper and this Report. His mastery of this little-understood area of the law has been of invaluable assistance.

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November 19, 1982.

APPENDICES

Appendix A

The following sections of the Wills Act *are subject to contrary intention appearing in or by the will.*

Revocation of gift on dissolution

16. (1) Where in a will a testator

(a) gives an interest in property to his spouse;

(b) appoints his spouse executor or trustee; or

(c) confers a general or special power of appointment on his spouse,

and after the making of the will and before his death

(d) a judicial separation has been ordered in respect of his marriage;

(e) his marriage is terminated by a decree absolute of divorce; or

(f) his marriage is found to be void or declared a nullity by a court

then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

1979-2-63; RS1979-434-47, proclaimed effective August 1, 1981.

Effective time of will

20. (1) When a will has been revived or re-executed by a codicil, the will is deemed to have been made at the time at which it was revived or re-executed.

(2) Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to the property.

RS1960-408-21.

Lapsed and void devises and bequests

21. Except when a contrary intention appears by the will, property or an interest in it that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will.

RS1960-408-22.

Inclusion of leaseholds in general devise

22. Except when a contrary intention appears by the will, where a testator devises

(a) his land;

(b) his land in a place mentioned in the will, or in the occupation of a person mentioned in the will;

(c) land described in a general manner; or

(d) land described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used,

the devise includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.

RS1960-408-23.

Exercise of general power of appointment by general gift

23. (1) Except when a contrary intention appears by the will, a general devise of

(a) the real property of the testator;

(b) the real property of the testator in a place mentioned in the will or in the occupation of a person mentioned in the will; or

(c) real property described in a general manner

includes any real property or any real property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

(2) Except when a contrary intention appears by the will, a bequest of

(a) the personal property of the testator; or

(b) personal property described in a general manner

includes any personal property or any personal property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

RS1960-408-24.

Devise without words of limitation

24. Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that the testator had power to dispose of by will in the real property.

RS1960-408-25.

Gifts to heirs

25. Except when a contrary intention appears by the will, where property is devised or bequeathed to the heir or next of kin of the testator or of another person, the devise or bequest takes effect as if it had been made to the persons among whom and in the shares in which the estate of the testator or other person would have been divisible if he had died intestate.

RS1960-408-26.

Meaning of "die without issue"

26. (1) Subject to subsection (2), in a devise or bequest of property

(a) the words

(i) "die without issue";

(ii) "die without leaving issue"; or

(iii) "have no issue"; or

(b) other words importing either a want or failure of issue of a person in his lifetime or at the time of his death or an indefinite failure of his issue

shall be deemed to refer to a want or failure of issue in the lifetime or at the time of death of that person and not to an indefinite failure of his issue unless a contrary intention appears by the will.

(2) This section does not extend to cases where the words defined in subsection (1) import

(a) if no issue described in a preceding gift be born; or

(b) if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.

RS1960-408-27.

Gifts to issue predeceasing testator

29. (1) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and

(b) leaves issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate without leaving a spouse and without debts immediately after the death of the testator.

(2) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and

(b) leaves a spouse but does not leave issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate and without debts immediately after the death of the testator.

RS1960-408-30; 1967-49-16; 1975-73-27.

Illegitimate children

30. In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

RS1960-408-31.

Primary liability of mortgaged land

31. (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

(2) A testator does not signify a contrary or other intention within subsection (1) by

(a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real or personal estate, or his residuary real estate; or

(b) a charge of debts on that estate,

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

(4) In this section "mortgage" includes an equitable mortgage, and any charge, whether equitable, statutory or of other nature, including a lien or claim on freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

RS1960-408-32.

Executor as trustee of residue

32. (1) Except where a contrary intention appears by the will, where a person dies after this Act takes effect, having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of for the persons among whom and in the shares in which the estate of the testator would have been divisible if he had died intestate.

(2) Nothing in this section affects or prejudices a right to which the executor, if this Part had not been passed, would have been entitled in cases where there is not a person who would be so entitled.

RS1960-408-33.

Appendix B

Proposals 5 and 6 from Working Paper No. 36, on Interpretation of Wills

5. (a) The *Trustee Act* be amended to provide that subject to a contrary intention, a class in whose favour a gift by will or *inter vivos* is made, should close naturally but if the effect of this provision would be to make the gift void as contrary to the rule against perpetuities, the class instead of closing naturally, will close pursuant to the provisions of sections 7 and 8 of the *Perpetuities Act*.

(b) The *Trustee Act* be amended to provide that evidence may be adduced to show that a class defined by reference to the child bearing capacity of a person has closed because the person is unable to have any more children, unless the settlor of the class gift provides when the class is to close.

(c) The *Trustee Act* be amended to provide that:

(i) Subject to a contrary intention, and subject to all prior interests in the subject matter of a class gift, the executor or trustee of a class gift be empowered to apply portions from the income or the corpus of the gift for the maintenance, advancement or otherwise for the benefit of a member or potential member of a class whether his interest is vested, notwithstanding that it is subject to divestment, or contingent.

(ii) The portion or aggregate of all portions advanced to a member or potential member of the class should not exceed the share he will be entitled to eventually, and where such share cannot be adequately estimated, the executor or trustee may require the member or potential member to provide sufficient security to ensure repayment of any sum in excess of the member's actual share when finally determined upon the closing of the class, or impose such further terms and conditions as may, under the circumstances, be appropriate.

(iii) Upon the closing of the class, the trustee shall distribute to each member his share of the class gift, and all portions advanced to any member shall be brought into account as part of that member's share.

(iv) A trustee who *bona fide* appropriates a sum from income or capital, or both, and applies it for the maintenance, advancement or otherwise for the benefit of a member or potential member of a class should be discharged from his fiduciary liabilities in respect of a sum so advanced.

(v) No action in equity or law should be maintained for the recovery of funds from a member or potential member who has received such a *bona fide* payment, except as it arises from the terms and conditions imposed by the trustee when the payment is made.

6. The *Wills Act* be amended to provide that subject to a contrary intention, a gift to a class designated as "issue" of a person or by another term denoting descendant kin, thus encompassing more than one degree or generation, shall be distributed in equal shares among the nearest issue of that person and among remoter issue of that person *per stirpes* throughout.